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A

TREATISE ON THE LAW

OF

PROMISSORY NOTES

AND

BILLS OF EXCHANGE.

BY

THEOPHILUS PARSONS, LL.D.

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AND AUTHOR OF TREATISES ON THE LAW OF CONTRACTS, ON THE ELEMENTS OF MERCANTILE LAW, ON MARITIME LAW, AND THE LAWS OF BUSINESS FOR BUSINESS MEN.

IN TWO VOLUMES.

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STAMPS.

These volumes were stereotyped before the Statute of the United States imposing stamps was enacted. An Appendix has been added at the close of the text of the second volume, immediately before the Index, containing an accurate reprint of the provisions of the Statute in relation to Bills, Notes, Letters of Credit, Drafts, Orders, and Checks; together with an examination of the questions which the Statute suggests; and the English authorities upon those questions which have arisen under the English Stamp-Acts and may arise under our own.

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THE LAW

OF

NOTES AND BILLS.

CHAPTER I.

OF TRANSFER BY INDORSEMENT.

SECTION I.

WHAT INDORSEMENT IS.

Literally, this word means only that one thing is on the back of another.(*a*) As applied to legal documents, it means a writing on the back of a written instrument; and it is frequently used in this last sense in relation to documents of various kinds. Thus it is said that conditions, agreements, or information given are indorsed upon a policy of insurance, or that a discharge is indorsed upon a mortgage deed. But in relation to notes and bills this word has a limited and technical meaning. Indeed, its exact and legal, as well as mercantile sense, is the transfer of a negotiable note or bill by the indorsement of some person who has a right to indorse. Nor can there be an indorsement in this sense of the word except by the payee of the bill; but he may be the original payee, or he may have become by previous indorsement a second or subsequent payee.

An indorsement may be said to operate both as an assignment and as a guaranty. But it differs from an assignment, in that an indorsee may bring the action in his own name, and an assignee cannot; or if he can by statute, as in some States, he

(*a*) An odd use of the word occurs in Milton's Paradise Regained, where he speaks of "elephants indorsed with towers." Book III. line 329.

is still subject to the defences which might be made against the assignor.

So an indorsement differs from a guaranty, in that a guarantor is not generally discharged by the absence of delay in demanding payment or in giving him notice of non-payment, without some evidence that he has been injured thereby.

So an indorser may be regarded as in some sense a surety; but one who is technically a surety on promissory paper is generally an original promisor, and primarily liable, which an indorser never is.

The indorsement by a payee makes a transfer of the note to the indorsee, so far that the common language of the law and of merchants is, that such a note or bill was indorsed to A, and it is seldom said was transferred by indorsement, unless there be some especial reason for this language, because the transfer is implied in the indorsement.

The questions which this subject of indorsement presents are so numerous and so various that they might seem to involve the whole law of negotiable paper. Many of these questions are considered elsewhere in connection with other topics. In this chapter, having stated what indorsement is, it is now proposed to consider, secondly, who may indorse; thirdly, to whom indorsement may be made; fourthly, at what time the indorsement may be made; fifthly, the manner of the indorsement; sixthly, the relations, rights, and obligations of the indorser and the indorsee.

In treating of these topics, reference will not be made to the questions or rules considered elsewhere; or if made, it will be such only as to preserve the connection and show the meaning of what is said.

SECTION II.

WHO MAY INDORSE.

Although only he can indorse who is originally payee, or has been made payee by indorsement to him, yet the owner of a note may obtain, as an accommodation or otherwise, any number of indorsements by persons who have as yet no connection with the paper, but are willing to add their credit to it. But, in the theory of the law, each one of these indorsers held the note by

a previous indorsement to him. And this theory must be carried out where either of these indorsers is sued. It is carried out, in practice, by means of the rule, that every holder of a note having on it a blank indorsement, or a name with nothing attached to it, may write over this name anything not inconsistent with what he knew to be the purpose of such indorsement. This subject will be considered more fully in the section on the manner of indorsement.

Indorsements, however, are not unfrequently made by persons who are not payees or indorsees. And such indorsement will make one a maker, or a guarantor, according to the circumstances of the case and the law of the place where it is made. This subject will be considered in the chapter on Guaranty.

An indorsement may be made by one who is, if we may so speak, partially incapacitated. Thus it seems to be the better rule, that an infant may indorse a bill, and the indorsement will have the effect of transferring the paper, so far that title may be made through the infant. But such indorsement will not hold him liable, nor will it pass the property in the note out of him, as against his interest.(*b*)

A married woman is more completely incapacitated. Her indorsement neither transfers the paper nor makes her liable, because the property in the note is in the husband, whether it was given to her before or after marriage. The effect of indorsement by a married woman, under various circumstances, is considered elsewhere, in connection with other topics. Here, we will only say, that the husband alone can indorse,(*c*) but may employ her as his agent; and her authority may be inferred from his promise to pay it, or from any competent evidence of custom; (*d*) and if she have such authority, it seems to be a sufficient execution of it if she indorses the note with her own name.(*e*) If the husband has not reduced the note to his possession, on his death the property in it reverts to his wife.

(*b*) Nightingale *v.* Withington, 15 Mass. 272; Taylor *v.* Croker, 4 Esp. 187; Jeune *v.* Ward, 2 Stark. 326; Grey *v.* Cooper, 3 Doug. 65. See *ante*, Vol. I. p. 70, note *m*.

(*c*) Connor *v.* Martin, 1 Stra. 516; Miles *v.* Williams, 10 Mod. 243.

(*d*) Lord *v.* Hall, 8 C. B. 627; Lindus *v.* Bradwell, 5 C. B. 583; Prestwich *v.* Marshall, 4 C. & P. 594; Cotes *v.* Davis, 1 Camp. 485.

(*e*) See cases cited in preceding note.

If the note be payable to A for the use of B, only A has the legal title, and only he can indorse.(*f*) If it be payable to A, to the order of B and C, only B and C can indorse it; but if they do, A may sustain an action against them as indorsers.(*g*)

If a note be indorsed by a person who is not the payee, but bears the same name, such indorsement, if not innocent, is a forgery; and, whether innocent or not, passes no property even to an innocent indorsee.(*h*)

If it be doubtful which of the two persons is in fact the payee, it may be otherwise, and evidence may be admissible to determine this question. Thus where a father and a son bear the same name, and it is the name of the payee, there may be a general presumption that the father is the payee. But the presumption must be slight, and may be rebutted by proof that the son brought the action on the note, or by any sufficient evidence of possession or control on his part.(*i*)

If the parties bear two names which are quite similar, but not the same, it seems to be held that no evidence is admissible to show that any person was payee with the right of indorsement, excepting him who bore that very name.(*j*)

If several persons who are not partners are payees, the indorsement must be made by all of them.(*k*) Nor will the fact that a party is a joint payee with another constitute any evidence of authority to indorse for his joint payee. It would seem that an opinion was entertained at one time, that the mere fact that two or more persons were joint payees of negotiable paper

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(*f*) Evans *v.* Cramlington, Carth. 5, Skinner, 264, affirmed in Exchequer Chamber, in 2 Vent. 307; Smith *v.* Kendall, 6 T. R. 123. But see Marchington *v.* Vernon, 1 B. & P. 101, note *c*.

(*g*) Willis *v.* Green, 10 Wend. 517.

(*h*) Mead *v.* Young, 4 T. R. 28; Gibson *v.* Minet, 1 H. Bl. 569, *et seq.*

(*i*) Sweeting *v.* Fowler, 1 Stark. 106; Stebbing *v.* Spicer, 8 C. B. 827.

(*j*) Bolles *v.* Stearns, 11 Cush. 320, was an action by the indorsee of a note payable to John P. Reed, and indorsed by Joseph P. Reed. It was admitted that a man by the name of John P. Reed was living in the same town with Joseph P. Reed, and the action was not sustained, although it appeared by the auditor's report, that the note was given to Joseph P. Read for money loaned by him, and a receipt of part payment was indorsed upon by Joseph P. Read. In Edwards on Bills and Notes, 251, it is said (citing Cowen's Treatise, 186), that, "although a note or bill be drawn payable to a person by a wrong name, the error will not affect his title nor destroy his right to transfer the paper."

(*k*) Carvick *v.* Vickery, 2 Doug. 653, note; Smith *v.* Whiting, 9 Mass. 334; Sneed *v.* Mitchell, 1 Hayw. 289; Jones *v.* Radford, 1 Camp. 83, note.

raised a presumption that they were partners as to that paper, so far at least as to give a part of them a right to indorse for all. But this view cannot now be considered as law, if it ever was so.(*l*) Either one of joint payees may of course authorize the other to indorse for him; and he may assign his interest in the paper to the other, and such assignment would carry with it this authority.(*m*)

By the insolvency of the payee, the property and control of the note pass to his assignees, who generally have the right to indorse it.(*n*) And it would seem that the insolvent could convey no right by his indorsement.(*o*) But if he holds the paper not in his own right, but as trustee, it does not pass by his insolvency to his assignees. And if an indorsement be necessary to carry into effect a contract previously made by the insolvent, it seems that he should indorse it.(*p*) But questions of this kind are frequently provided for in our statutes of insolvency.

On the death of a payee, and the appointment of executors by the will or of administrators by the court, they have the exclusive right to indorse the paper of the deceased.(*q*) If they do so in payment of their personal debt, it would of course be a fraud, and if the indorsee has knowledge of the fraud, he derives no title by the indorsement.

If the note were indorsed by the deceased, but not delivered, the executors or administrators of the deceased cannot, it is held, deliver the note without a new indorsement by them.(*r*) If he delivered the note without indorsement for value, it would undoubtedly be their duty to indorse it.

If there be more than one executor or administrator, it may be doubted whether one only can make a sufficient indorsement;

(*l*) See Wood *v.* Wood, 1 Harrison, 428, and cases cited in preceding note.

(*m*) Russell *v.* Swan, 16 Mass. 314; Goddard *v.* Lyman, 14 Pick. 268.

(*n*) Ex parte Mowbray, 1 Jac. & W. 428; Ex parte Brown, 1 Glyn & J. 407; Ex parte Hall, 1 Rose, 13; Ex parte Rowton, id. 15.

(*o*) Smith *v.* De Witts, 6 Dowl. & R. 120, s. c. *nom.* Smith *v.* De Wruitz, Ryan & M. 212. See, however, *dicta* in Ashurst *v.* Royal Bank of Australia, Q. B. 1856, 37 Eng. L. & Eq. 195.

(*p*) Ex parte Greening, 13 Ves. 206; Watkins *v.* Maule, 2 Jac. & W. 237; Smith *v.* Pickering, Peake, 50; Wallace *v.* Hardacre, 1 Camp. 46.

(*q*) Rawlinson *v.* Stone, 3 Wilson, 1; Watkins *v.* Maule, 2 Jac. & W. 237; Rand *v.* Hubbard, 4 Met. 252; Malbon *v.* Southard, 36 Maine, 147; Dwight *v* Newell, 15 Ill. 333.

(*r*) Bromage *v.* Lloyd, 1 Exch. 32; Gough *v.* Findon, 7 Exch. 48.

but there is American authority which would seem to be in favor of the validity of an indorsement by one of them.(*s*) But if a note be given expressly to two or more persons, as executors or administrators, although given on account of the estate, it must be indorsed by all.(*t*)

Because an indorser can only give what power he has, and an executor or administrator can maintain an action only within the limits of the State which appoints him, it is said that his indorsee cannot bring an action in another State.(*u*) We should have some doubt whether this may be regarded as a universal rule.

An executor or administrator, like any other trustee, will be held by his indorsement personally, although he add to his name the word "executor" or "administrator," unless he say expressly that recourse is to be had, not to him, but only to the estate of the deceased.(*v*)

All contracts made by persons who have not sufficient mind to contract are, on general principles, void. And if a holder of a note becomes insane, and while insane indorses it, we should say that his indorsement was wholly void in the hands of any subsequent holder, whether he knew of the insanity or not. And that the same rule should apply to any person under such guardianship as implies an incapacity to contract.(*w*)

Either partner may indorse for the partnership, with the partnership name, and his indorsement will bind the partnership, if made in good faith and in the business of the firm. If made fraudulently, or outside of the business of the firm, it will still

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(*s*) Wheeler *v.* Wheeler, 9 Cowen, 34. Both in England and in America this has been held so far an indorsement in fact, that an indictment may be sustained for the forgery of it. Reg. *v.* Winterbottom, 1 Den. C. C. 41, 51, 2 Car. & K. 37; Smith *v.* Whiting, 9 Mass. 334.

(*t*) Smith *v.* Whiting, 9 Mass. 334.

(*u*) Thompson *v.* Wilson, 2 N. H. 291; Stearns *v.* Burnham, 5 Greenl. 261.

(*v*) Childs *v.* Monins, 2 Brod. & B. 460, 5 J. B. Moore, 280; King *v.* Thom, 1 T. R. 487; Ridout *v.* Bristow, 1 Tyrw. 84, 1 Cromp. & J. 231; Serle *v.* Waterworth, 4 M. & W. 9, 6 Dowl. 684; Nelson *v.* Serle, 4 M. & W. 795; Seaver *v.* Phelps, 11 Pick. 304; Beals *v.* See, 10 Barr, 56.

(*w*) See Peaslee *v.* Robbins, 3 Met. 164; Burke *v.* Allen, 9 Post. 106; Johnson *v.* Chadwell, 8 Humph. 145; Putnam *v.* Sullivan, 4 Mass. 45. There are English cases which seem to require that a defendant cannot show his insanity for the avoidance of his contract, unless the plaintiff knew it, and fraudulently availed himself of it. Browne *v.* Joddrell, Moody & M. 105, 3 C. & P. 30; Levy *v.* Baker, Moody & M. 106, note *b*. But see Gore *v.* Gibson, 13 M. & W. 623; Alcock *v.* Alcock, 3 Man. & G. 268.

bind the partnership in favor of a holder for value who had no knowledge of the fraud, and whose want of knowledge was not his own fault. Questions of this kind arise under a great variety of circumstances, and are elsewhere fully considered.

Of the authority of one partner after dissolution to transfer by indorsement a note which is the property of the firm, we have spoken elsewhere,(*x*) and merely add here, that the cases generally are opposed to the exercise of this power. But if after any dissolution a partner indorses the name of the firm without authority, it is said that he thereby transfers his own interest in the note.(*y*) It was doubted by Lord Kenyon whether, if a bill were indorsed before the dissolution, but not issued or negotiated until afterwards, the indorsement would be valid, unless authority to make it was shown.(*z*)

A payee may indorse by an agent. The authority need not be in writing; it may, indeed, be given orally by the payee to a maker for whose accommodation the note is drawn.(*a*) An authority to indorse for sixty or ninety days is an authority to indorse for any intermediate period, but not for one less than the shortest or longer than the longest.(*b*)

An authority to indorse a note is not an authority to indorse for the same principal a new note, when the principal has been discharged on the former note by want of demand or of notice.(*c*) An authority to sign and indorse notes at a certain bank gives no authority to sign or indorse notes at any other bank.(*d*) An authority to draw is not an authority to indorse.(*e*)

A corporation may authorize an agent to indorse by vote, or a vote of the directors, if it falls within their duty, and a cashier of a bank or similar corporation would be presumed to have this power.(*f*)

(*x*) See *ante*, Vol. I. p. 145, note *l*, and p. 146, notes *t* to *w*.

(*y*) Jones *v.* Thorn, 14 Mart. La. 463.

(*z*) Abel *v.* Sutton, 3 Esp. 108.

(*a*) Turnbull *v.* Trout, 1 Hall, 336.

(*b*) So held under a power to renew a note. Bank of South Carolina *v.* Herbert, 4 McCord, 89. See also Batty *v.* Carswell, 2 Johns. 48.

(*c*) Bank of the State *v.* Croft, 3 McCord, 522, and Ward *v.* Bank of Kentucky, 7 T. B. Mon. 93.

(*d*) Morrison *v.* Taylor, 6 T. B. Mon. 82.

(*e*) Robinson *v.* Yarrow, 7 Taunt. 455.

(*f*) Fleckner *v.* Bank of United States, 8 Wheat. 338. See as to the indorsement

Aliens at peace may make a valid indorsement; but in general the indorsement of an alien enemy would not be regarded,(*g*) unless it were a ransom bill, or something equally exceptional. Thus, where a bill was drawn by an alien at war with England on an English subject resident in England, and indorsed to an English subject resident in France, it could not be enforced in England, even after the war had terminated.(*h*) But where an English prisoner in France drew a bill on an English subject in England, payable to another English prisoner in France, and it was indorsed to an alien enemy, the indorsee was allowed to recover the amount from the acceptor after peace.(*i*) So a promise after peace to pay such a bill would be valid.(*j*) And a neutral has been permitted to recover in England on a note given him by an English subject in an enemy's country for goods sold there.(*k*)

SECTION III.

TO WHOM INDORSEMENT MAY BE MADE.

Negotiable paper may be indorsed to any one but an alien enemy, and, as we have seen, even to him under special circumstances. But a question may then arise as to the effect of the indorsement.

If to a married woman, it gives the husband the right to elect whether to treat it as payable to himself or to his wife, or perhaps to himself and his wife jointly, or to treat it as altogether hers, which it becomes on his death, if he have not reduced it into his own possession.

If it be indorsed to an infant, or to one *non compos*, it might still be valid, if it were a mere gift or payment to him.

If to a trustee, or to any one who holds an office of trust, as

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by the president of a bank, Spear *v.* Ladd, 11 Mass. 94, and also Northampton Bank *v.* Pepoon, id. 288.

(*g*) Willison *v.* Patteson, 7 Taunt. 439; Brandon *v.* Nesbitt, 6 T. R. 23.

(*h*) Willison *v.* Patteson, 7 Taunt. 439.

(*i*) Antoine *v.* Morshead, 6 Taunt. 237; Daubuz *v.* Morshead, id. 332.

(*j*) Duhammel *v.* Pickering, 2 Stark. 90.

(*k*) Houriet *v.* Morris, 3 Camp. 303.

executor or guardian, the legal interest will be in him, subject to the beneficiary interest created by the trust.

If to an agent, the legal interest vests in the principal, who may claim it in any way he pleases. But as to every one but the owner, the agent is the holder, and only the agent can indorse it over, if the principal be no party to the paper.

SECTION IV.

AT WHAT TIME AN INDORSEMENT MAY BE MADE.

It is undoubtedly a general presumption of law that indorsed paper was indorsed before maturity. And a party who denies this, and alleges that it was indorsed when overdue, must prove it; nor without this proof can he avail himself of the equities of defence.(*l*) But then the question may arise, how far this necessity of proof extends, or, in other words, what evidence will discharge this burden of proof and rebut this presumption.

In some cases it is held that the indorsement is presumed to have been made at the day the note was made; (*m*) and it has also been held, that if the defendant proves that the note was not indorsed on that day, the whole basis of the presumption, and the whole presumption itself, fails, and the plaintiff must show that the indorsement is genuine, and was made before suit.(*n*)

It is, however, somewhat difficult to see sufficient ground for any more definite presumption than that the indorsement was

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(*l*) Lewis *v.* Parker, 4 A. & E. 838, 6 Nev. & M. 294, 2 Har. & W. 46; Parkin *v.* Moon, 7 Car. & P. 408; Masters *v* Barrets, 2 Car. & K. 715; Cripps *v.* Davis, 12 M. & W. 159. See Webster *v.* Lee, 5 Mass. 334; Burnham *v.* Wood, 8 N. H. 334; Washburn *v.* Ramsdell, 17 Vt. 299; Leland *v.* Farnham, 25 id 553; Hendricks *v.* Judah, 1 Johns. 319; Pinkerton *v.* Bailey, 8 Wend 600; Andrews *v.* Chadbourne, 19 Barb. 147; McDowell *v.* Goldsmith, 6 Md. 319. 338; Pettis *v.* Westlake, 3 Scam. 535; Mobley *v.* Ryan, 14 Ill. 51; Canfield *v.* Gibson, 13 Mart. La. 143; Davie *v.* Stevens, 10 La. Ann. 496; Watson *v.* Flanagan, 14 Texas, 354; *Livingston*, J., Stuart *v* Greenleaf, 3 Day, 311. *Contra*, *Edwards*, J., id.

(*m*) Hutchinson *v.* Moody, 18 Maine, 393; Burnham *v.* Webster, 19 id. 232; Parker *v.* Tuttle, 41 id 349; Ewing *v.* Sills, 1 Smith, Ind. 46; Bates *v.* Pricket, 5 Ind. 22. See Pinkerton *v.* Bailey, 8 Wend 600; McDowell *v.* Goldsmith, 6 Md. 319, 338. Watson *v.* Hanagan, 14 Texas, 354.

(*n*) Parker *v.* Tuttle, 41 Maine, 349.

made before maturity. For paper may circulate as an instrument of business if indorsed at any time before maturity; and the only reason for any presumption whatever as to the time of indorsement is, that the paper may so circulate without obstruction.(*o*)

If the time of indorsement is material to the plaintiff's case in any other respect, we should say that the burden of proof of the precise time was on him. And it may be well to remark, that the presumption of time is a presumption of fact; and the question of time is a question of fact; and the jury should determine these questions, aided by the presumptions of law in connection with the circumstances attending the transfer.(*p*)

The presumption may be rebutted by evidence that the note remained the property of the payee after its maturity; and any acts or declarations of the payee in regard to his ownership are admissible evidence to prove this fact.(*q*) And this presumption does not exist where it is negatived by the declaration; as where there is an allegation that the note was transferred on a certain day, which day was subsequent to the day of maturity.(*r*)

It seems, however, to make no difference, as to this presumption, whether the note is offered in evidence under a general count for money had and received,(*s*) or is used by way of set-off.(*t*)

An indorsement may certainly be made, as we have seen that an acceptance may,(*u*) before the bill or note is made, upon a blank slip of paper; and the indorser will be estopped from setting up this fact in defence.(*v*) Such a paper is indeed a letter

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(*o*) In Burnham *v.* Wood, 8 N. H. 334, 336, *Upham*, J. said: "The presumption is that the note was indorsed within a reasonable time after its date."

(*p*) Anderson *v.* Weston, 6 Bing. N. C. 296.

(*q*) Hutchinson *v.* Moody, 18 Maine, 393.

(*r*) Andrews *v.* Chadbourne, 19 Barb. 147.

(*s*) Burnham *v.* Wood, 8 N. H. 334.

(*t*) Pettis *v.* Westlake, 3 Seam. 535.

(*u*) *Supra*, Vol. I., chapter on Acceptance.

(*v*) Violett *v.* Patton, 5 Cranch, 142, a suit by an indorsee against his immediate indorser. Russel *v.* Langstaffe, 2 Doug. 514, a case on a check. Lord *Ellenborough* said, in reference to this case in Snaith *v.* Mingay, 1 Maule & S. 87: "In that case, at the time of the indorsement it was not a bill of exchange; but the moment the other parts were filled up by an authorized agent, then it became the bill of the party, and was considered as fit to be declared on as such. I remember the case at Durham, and afterwards in this court. It was asked upon that occasion how the allegation in the declaration, 'that the defendant *afterwards* indorsed the said bill,' could be sustained. But the court resolved that they would so adjust the acts of the party as to give effect

of credit for an indefinite sum; and the indorser will be bound for the payment of the sum, and at the time, subsequently written,(*w*) although the blanks were filled up fraudulently, provided the holder was ignorant of the fraud.(*x*) Nor is it necessary, to make the holder's claim valid, that he should be ignorant that the blanks were left, unless he also knew that the agent's authority to fill the blanks was limited. Without such knowledge, he may, acting in good faith, fill them himself.(*y*)

In England, there is a limit to the amount by means of the excise stamp; and now the indorsement of bills and notes for less than £5 is prohibited by statute.(*z*)

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to the intention, and for that purpose held, that an indorsement which was prior in point of time to the drawing was to be considered in law as posterior." Putnam *v.* Sullivan, 4 Mass 45. In Mitchell *v.* Culver, 7 Cowen, 336, the indorser gave the note to the maker with his name on the back, and a blank for the date. The plaintiff, at the maker's direction, inserted a date, so that the note had more than twenty days less to run than if it had been dated at the time of indorsement. The indorser was held. So Mechanics', &c. Bank *v.* Schuyler, 7 Cowen, 337, note *a*. But the blank in this case was filled before it came to the plaintiff's hands, and he was not aware of the fact. Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11. In Collis *v.* Emett, 1 H. Bl. 313, a party signed his name at the foot of a blank paper, duly stamped, and delivered it to another party to draw such a bill upon it as he should see fit. The party drew it payable to a fictitious payee, and indorsed for value. Held that the last party could sue the drawer as on a bill payable to bearer. In Usher *v.* Dauncey, 4 Camp. 97, one partner signed and indorsed a similar blank with the firm name, and the firm were held. In Cruchley *v.* Clarance, 2 Maule & S. 90, a party drew a bill with a blank for the payee's name. The holder filled it up with his own name, and the drawer was held.

(*w*) Lord *Mansfield*, C. J., Russel *v.* Langstaffe, 2 Doug. 514; *Buller*, J., Lickbarrow *v.* Mason, 6 East, 21, note; Lord *Ellenborough*, C. J., Cruchley *v.* Clarance, 2 Maule & S. 90; *Sutherland*, J., Mechanics', &c. Bank *v.* Schuyler, 7 Cowen, 337, note *a*; *Bennett*, J., Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

(*x*) Putnam *v.* Sullivan, 4 Mass. 45. In this case, the defendants left with their clerk several blanks, some of which were to be filled up by him so as to make the firm promisors, and others so as to make them indorsers. The clerk was instructed to deliver one of the blanks to the promisor of the note in suit, to put his name upon as promisor, in order that he might renew a certain note. The promisor, after having obtained one blank for the purpose, pretended that it had become useless, and, after having feigned to burn it, in the clerk's presence, procured another blank, and by a similar pretension obtained a third and fourth. The last blank was used for the purpose originally intended. The note upon which the defendants were sued as indorsers was on one of the prior blanks which had been negotiated to the plaintiffs. The promisors had absconded, and the defendants were held. See also Griggs *v.* Howe, 31 Barb. 100, affirmed, Van Duzer *v.* Howe, 21 N. Y. 531.

(*y*) Cruchley *v.* Clarance, 2 Maule & S. 90; Putnam *v.* Sullivan, 4 Mass. 45, *supra*, note *v*; Mitchell *v.* Culver, 7 Cowen, 336. See Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

(*z*) 17 Geo. III. c. 30, § 1.

In this country there would seem to be no limit to the amount; but where there is a blank for the amount in the body of the note, and the amount is given in figures in the margin, it would seem that a holder for value can have no right to fill up the blank with a larger sum than is indicated in the margin, so as to give him a claim for a larger sum against the indorser.(*a*)

If a question arises as to the time when, or within which, the blanks were or should be filled, there are cases in which it appears to be regarded as a question for the jury.(*b*) But in one case it was held, as a matter of law, that an indorser was liable, although the blanks were not filled until twelve years after the time the paper was indorsed; and that the statute of limitations began to run from the time as shown on the face of the note, and not from the time of the indorsement.(*c*)

When such blanks in a bill are filled, and the question arises whether the bill is a foreign bill or an inland bill, it has been held that the bill takes effect by relation to the time and place of filling the blanks.(*d*)

Death must operate as a revocation of the authority to fill the blanks, unless this authority is coupled with an interest. Thus, where a bill, with the date and time of payment left blank, was indorsed by A to B, and B after A's death presented the bill to the plaintiffs for discount, and they discounted the bill for B, relying upon the indorsement and in ignorance of the death of A, and filled the blanks at B's request, it was held that A was to be regarded as an accommodation indorser, that the death of A, before any act had been done under the authority given by his

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(*a*) *Williams*, C. J., Norwich Bank *v.* Hyde, 13 Conn. 279.

(*b*) In Mulhall *v.* Neville, 8 Exch. 391, note, the drawer signed and indorsed a blank dated a year after it was signed. Five years afterwards the blank was filled up, and made a bill payable in five years. Evidence of these facts was rejected at Nisi Prius, and a verdict rendered for the plaintiff. A new trial was granted, to see whether, under the circumstances, there was any reasonable limitation in point of time for filling up the blanks. See Temple *v.* Pullen, 8 Exch. 389, an action against the maker of a note, in which the blanks had been filled five years subsequent to the signing. Held, that it was properly left to the jury to say whether it was filled up within a reasonable time, and they found for the plaintiff.

(*c*) See Montague *v.* Perkins, C. B. 1853, 22 Eng. L. & Eq. 516, an action against an acceptor. The jury found that the blank acceptance had not been filled up within a reasonable time, and found for the defendant. Verdict set aside, and judgment entered for the plaintiff.

(*d*) Smith *v.* Mingay, 1 Maule & S. 87; Barker *v.* Sterne, 9 Exch. 684.

signature, was an absolute revocation of the authority, and consequently that the plaintiffs could not recover from A's representatives.(*e*)

After dishonor the utility of the paper as an instrument of business has passed away to a great extent, and the reasons for giving it the protection of the peculiar rules of the law of negotiable paper have also to the same extent passed away. Then the common rules of the law of contracts come into force. But it is nevertheless true that these rules are somewhat modified by the principles of the law of negotiable paper; for the instrument is still a promissory note or a bill of exchange, although it is a dishonored one. Thus it has been held that the indorsement of a negotiable note after dishonor is itself negotiable, without writing the words "or order," and that the maker may sue in his own name.(*f*)

This subject is fully considered elsewhere, and the various questions which it presents are considered in connection with the various circumstances under which they have arisen.

It seems to have been sometimes thought that a note indorsed and transferred after it is due and unpaid is like an indorsed note on demand. It is so in some respects. And the indorser will undoubtedly then be held to the indorsee or subsequent holder, if the requirements respecting demand and notice proper to notes on demand are all complied with.

It is also true, that if, upon the maturity and non-payment of a note or bill, or presentment for acceptance of a bill and refusal, there has been due demand and notice, so as to fix the rights and obligations of all or of any of the parties in favor of the holder,

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(*e*) Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11. In Usher *v.* Dauncey, 4 Camp. 97, a member of a firm signed and indorsed a blank with the partnership name, and gave it to the clerk to use. The latter, after the member's death, drew the bill, dating it prior to the death, and negotiated it. The surviving partners, who had formed a new partnership, were held, although they had received no value for the bill. Lord *Ellenborough*, C. J. said: "That the power must be considered to emanate from the partnership, not from the individual partner, and that therefore after his death the bill might still be filled up so as to bind the survivors." See *supra*, Vol. I. pp. 144–147.

(*f*) Leavitt *v.* Putnam, 3 Comst. 494, overruling the decision of the Superior Court, reported 1 Sandf. 199. In this case the note was indorsed by the payee, who was the defendant, after maturity, in the following words: "Pay the within to A. Thatcher, value received." Thatcher indorsed it in blank without recourse. Held, that the holder might sue in his own name. See *supra*, Vol. I. p. 227.

that holder, or any indorser paying the note and having in him a right to look to prior parties, may indorse and transfer the note; and by such transfer he gives to his indorsee all his rights or claims against other parties.

But it does not seem to be quite settled what is the contract or obligation of the indorser himself, when he transfers the paper by indorsement to another party, after its dishonor, and after the proper steps have been taken to charge him.

In one case such a transaction was held to be equivalent to drawing a new bill at sight (or on demand), and presentment and demand and notice were necessary. But a dissenting opinion was delivered, on the ground that the indorser, under the circumstances, had no right to expect that the bill would be honored, and consequently was not entitled to demand and notice.(*g*)

There certainly would seem to be some ground for contending that, where a party transfers by indorsement a note to which the liability has become fixed, he should be considered as having subjected himself also to a primary liability thereon.

SECTION V.

OF THE MANNER OF INDORSEMENT.

A NEGOTIABLE note may be transferred without indorsement, and this subject will be considered elsewhere, under the head of Assignment.

Although it is generally true that no particular and precise form of words is necessary to constitute a note or bill or an indorsement,(*h*) yet this principle must be regarded as subject to some qualification. So far as the matter of transfer is concerned, the proposition is almost absolutely true. But as to the obligations cast upon the indorser by the act of indorsement, it is clear that

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(*g*) Hunt *v.* Wadleigh, 26 Maine, 271. *Shepley*, J. delivered the opinion of the court; *Whitman*, J. dissented.

(*h*) In Partridge *v.* Davis, 20 Vt. 499, *Davis*, J. said: "No prescribed formula need be observed to constitute an indorsement. It is governed, like the instrument on which it is made, by those liberal principles of construction which pervade all mercantile contracts; paying little attention to mere technical rules, but endeavoring to ascertain and carry into effect the real intentions of the parties to them."

these may vary in accordance with the form of the indorsement Thus, under the topic of Excuses for Non-Notice, we have already considered such phrases as "eventually accountable," "holder," "backer," "surety," and some others, where they were written in connection with the indorser's name.(*i*) And hereafter we shall inquire when one whose name is on the back of a bill or note is to be regarded as a guarantor, and not as an indorser.

It is quite certain, that a person cannot be held as indorser by a mere promise to indorse, or unless his name is written in some way on the paper.(*j*) If the promise is made on a sufficient consideration, an action may be maintained for the breach.(*k*)

If a note is delivered without indorsement, the transferrer may

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(*i*) *Supra*, Vol. I. p. 579.

(*j*) In Fenn *v.* Harrison, 3 T. R. 757, a party gave a note to A to get it discounted, but refused to indorse it. A delivered it to B for the same purpose, and B, finding that he could not otherwise negotiate it, indorsed it, A promising to indemnify him. The party who took it endeavored to hold the original party, who had promised to pay the bill; but it was held that no action would lie, because A was a special agent, with limited authority, and the subsequent promise was void because without a consideration. This case came before the court on its third trial, 4 T. R. 177. The same evidence was given as on the former trials, with this difference, that when the defendants desired F. Huet to get the bill discounted, *they did not say that they would not indorse it.* The jury found for the plaintiffs, and the court refused to set the verdict aside, on the ground that, as the defendant had authorized their agent to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts. It was remarked by the justices, that, unless the evidence had varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion. In Vincent *v.* Horlock, 1 Camp. 442, a bill had been indorsed in blank by the payee, and delivered to A, who wrote over the indorsement, "Pay the contents to B." Held, that A was not liable as indorser. Park, for the plaintiffs, contended that this was an indorsement by A, and that any words written on the bill, showing an intent of the party to transfer, were sufficient, without the addition of the name. But Lord *Ellenborough* said: "I am clearly of opinion that this is not an indorsement by the defendant. For such a purpose, the name of the party must appear written with intent to indorse. We see these words: 'Pay the contents to such a one' written over a blank indorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted. When a bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the exercise of this power is only *expressio eorum, quæ tacite insunt.* This is a sufficient indorsement *to the plaintiffs*, but not *by the defendants.*" In Moxon *v.* Pulling, 4 Camp. 51, it was held that a promise to indorse was not an indorsement, so as to render the party liable as indorser, though he might be liable for refusing to perform his promise.

(*k*) See Moxon *v.* Pulling, 4 Camp. 51.

indorse it after he has become a bankrupt,(*l*) and equity will compel the assignees to make the indorsement.(*m*)

We have seen that the decisions have been so lax as to regard almost any kind of mark on the paper as a signature,(*n*) and have expressed our opinion that such views indicate a forgetfulness of the character and function of negotiable paper.(*o*)

The signature need not be in the writing of the indorser; but if it be not, there must be proof that he had authorized the signature. Even if the indorsement be in the handwriting of the maker, if the indorser receives notice, is sued, suffers default, but makes neither defence nor denial until after the maker absconds, he cannot deny his signature; or if he does, proof that he had assumed other paper similarly indorsed would be conclusive against him.(*p*)

So we have seen that a married woman may write either her own name or her husband's; and if she have his authority, he will be held as indorser.(*q*)

(*l*) Smith *v.* Pickering, Peake, N. P. 50. So in Watkins *v.* Maule, 2 Jac. & W. 237, where the note was indorsed after the bankruptcy and decease of the payee, by his administrator.

(*m*) Ex parte Greening, 13 Ves. 206; Ex parte Rhodes, 3 Mont. & A. 217. See Anonymous, 1 Camp. 492, note.

(*n*) In Brown *v.* Butchers', &c. Bank, 6 Hill, 443, *Nelson*, C. J. said: "The cases show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intends to bind himself." Geary *v.* Physic, 5 B. & C. 234, where Lord *Tenterden* said: "The law of merchants requiring only that an indorsement of bills of exchange should be in writing, without specifying the manner with which the writing is to be made." Closson *v.* Stearns, 4 Vt. 11, a suit by the indorsee of the payee, whose indorsement was in pencil. Partridge *v.* Davis, *Davis*, J., 20 Vt. 499, 503; so the maker's signature may be in pencil. *Supra*, p. 22. In Merchant's Bank *v.* Spicer, 6 Wend. 443, a check was indorsed first by the payee, and afterwards by the defendant, by the initials "P. W. S.," and this indorsement was regarded as sufficient. In Brown *v.* Butchers', &c. Bank, 6 Hill, 443, the figures 1, 2, and 8 were written in pencil in the handwriting of the defendant, and, though it appeared that he could write, the indorsement was held to be sufficient. It would be somewhat difficult to see how, if this transaction was an honest one, the defendant could, under the circumstances, have intended to transfer the note. If it was dishonest and fraudulent, he should have been, we think, responsible for his fraud; but he could not have been entitled to the privileges of an indorser. In George *v.* Surrey, Moody & M. 516, *supra*, Vol. I. p. 23, note *a*, which was an action against the acceptor of a bill drawn by Ann Moore, payable to her order, and indorsed by her to the plaintiff, both the signatures as drawer and indorser were made by her mark.

(*o*) See *supra*, Vol. I. p. 23.

(*p*) Weed *v.* Carpenter, 10 Wend. 403.

(*q*) *Supra*, Vol. I. p. 80.

So where a party carries on his own business on his own account, but in the name of a corporation, he may indorse a note payable to the corporation by writing his own name.(*r*) In all such cases, the name used is supposed to have been adopted and appropriated by the indorser.

A note may be payable to two or more persons by their surnames; and although they are not partners, evidence may be received to identify them, and give them the power of indorsement; and if the same names were used in the indorsement, or the whole names of the parties, it would undoubtedly be valid.(*s*)

The law always requires that the indorsement shall be made by the same parties to whom the paper was made payable. Therefore, in the instances above cited, the plaintiff was required to prove, by evidence from without, that the payees and indorsees were the same persons. Nor can it be objected to such evidence, that it is inadmissible because it varies or controls a written instrument.

We have already considered the cases where there were two persons of the same name, and where, by a mistake in the name, that of a person not intended was written. It is quite clear that mere misspelling does not vitiate an indorsement.(*t*)

An indorsement is usually, as the word implies, written on the back of the instrument. It always should be written there; and, although there is authority for saying that it may be writ-

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(*r*) Bryant *v.* Eastman, 7 Cush. 111, where it was held, that a person who carries on business on his own account, in the name of a company which has been incorporated but not organized, and receives in payment of a debt contracted with him in such business a promissory note payable to order of the corporation, may transfer the note by indorsing it in his own name.

(*s*) Rogers *v.* Reed, 18 Maine, 257, an action against the maker of a note, payable to Messrs. Cutter & Rogers and George W. Drinkwater or order. Cutter & Rogers had been partners before the date of the note, and the judge, at Nisi Prius, instructed the jury to find for the defendant, unless they could infer from the evidence that the parties were in partnership at the date of the note, and that this inference could not be drawn from the fact that they were partners some ten months before the date. The instructions were held correct.

(*t*) Leonard *v.* Wilson, 2 Cromp. & M. 589, 4 Tyrw. 415, where a note was indorsed to "Messrs. Terney & Farley," and indorsed by "Thomas Terney & Farelly." So Rogers *v.* Reed, 18 Maine, 257, where one of the payees was Geo. W. Drinkwater, and the note was declared on as payable to Geo. L. Drinkwater, by the name of Geo. W. Drinkwater.

ten on the face,(*u*) we are quite sure that a circumstance so unusual would be regarded with suspicion, and would require explanation.

Any number of persons may indorse successively; and to do this conveniently, they may attach a piece of paper to the instrument.(*v*) On the continent of Europe, and sometimes in England, this added paper is called an "allonge"; but we do not know that this French word has been adopted into mercantile usage in this country.

Foreign bills are, as we have stated, drawn in sets, which constitute in law one bill. As a payment or cancellation of one copy is a discharge of all, the indorsee should require that all should be indorsed and given to him; although, so far as the property in the bill is concerned, this might pass by indorsement of one copy, as against a person holding another copy by subsequent indorsement, although the indorser would be held to such subsequent indorsee.

An indorsement may be in blank, and is so called when it consists of nothing more than the indorser's name; an indorsement is in full when the indorser writes over his name a direction to pay to a certain person or his order. It may also be qualified in various ways, and made special, conditional, or restrictive.

By far the most common way of indorsing in actual use is by blank indorsement; this indeed may be considered the custom, and anything written besides the name may be taken as an exception. For a blank indorsement is effectual to pass the paper, and gives to the transferee unqualified power of disposition of

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(*u*) Partridge *v.* Davis, 20 Vt. 449, 503; Young *v.* Glover, 21 Jur. 637. In Gibson *v.* Powell, 6 How. Miss. 60, the indorsement by the payee was directly under the maker's name, at the foot of the note. The declaration contains two counts, one against the payee as a joint maker, and the other as maker of a note payable to bearer. Held, that the plaintiff could not recover in the action. In Rex *v.* Bigg, 3 P. Wms. 419, 428, 1 Stra. 18, the question was, whether a writing on the face of a bank-note was properly described as an indorsement, in an indictment under a statute making it a felony to "alter or rase an indorsement on a bill or bank-note." A receipt for part payment had been written on the face of the note, and the defendant had expunged it by the use of lemon-juice. The majority of the judges, as reported in Peere-Williams, — all, according to the report in Strange, — held the description accurate, and the prisoner was convicted and transported. See also the remarks of Lord *Ellenborough*, in the case of Yarborough *v.* Bank of England, 16 East, 6, 12.

(*v*) Folger *v.* Chase, 18 Pick. 63; Partridge *v.* Davis, 20 Vt. 499, 503, *per Davis*, J.

the paper, and is therefore more convenient to him, while it lays no additional obligation on the indorser.

The first effect of an indorsement in blank is to make the paper payable, not to the transferee as indorsee, but as bearer.(*w*)

It is therefore payable to any other person who is bearer, or holder, or to any number of persons who may hold it jointly and sue upon it jointly. It is obvious, therefore, that the transferee by blank indorsement, whom we will call A, may transfer it merely by delivery, if he prefers to do so, and has then no responsibility as indorser. Or, if he prefers, he may write over the name of the indorser, "Pay to A," and then he becomes indorsee, and cannot transfer the note without indorsing it himself as second indorser. And he may indorse it in full or in blank; if in blank, the holder may again write his own name or not, and if he writes it, write over his name a special direction or not, at his pleasure.

In general, the holder of a note or bill upon which there is a blank indorsement — whether there be other indorsements which are in full or not — has the right to write over the name of the blank indorsement a direction to himself or to any other person, or any other words which do not enlarge the liability of the indorser.

A holder cannot alter the directions already given by indorsers, and must make out the chain to himself through them, until there is a blank indorsement; but he may fill this payable to himself, and disregard or strike out those that follow. And it has been held, that if a holder makes an early blank indorsement payable to himself, without erasing subsequent names, he does not discharge subsequent indorsers. If a holder after six indorsements, for example, fills the first indorsement so as to make it payable to himself, and thereon sues the maker, this does not prevent his suing the later indorsers afterwards. And therefore if a later indorser pays the note, he may sue any parties prior to himself.(*x*) But we should think it might be said

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(*w*) In Peacock *v.* Rhodes, 2 Doug. 633, Lord *Mansfield* said: "I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery; and possession proves property in both cases."

(*x*) Cole *v.* Cushing, 8 Pick. 48. The plaintiff in this case was second indorser. There was a third indorser, and his indorsee filled the first indorsement payable to himself, and sued the maker, and failed to get payment. Then the plaintiff paid the note

in such a case, that, when the holder made the note payable to himself by the first indorser, he made himself indorsee of that indorser, and thereby discharged all subsequent indorsers.

The principal practical advantage of an indorsement in blank is, that it permits the holder (whether he hold it in his own right, or only as agent of the indorser or owner) to transfer it without, on the one hand, indorsing it himself so as to be liable on it, or, on the other, indorsing it in such a way as expressly to refuse liability, and thus to cast suspicion on the note, or, at all events, to indicate through whose hands it had passed. Hence the practice, to which we have before alluded, of having notes made to the maker's own order, and indorsed by him.

The holder of paper indorsed in blank may not only write directions to whom it shall be paid, but may, as we believe, write what else he will, consistent with the liability assumed by the indorser. He cannot, for example, write over the indorser's name, "demand and notice waived," for this would enlarge the liability of the indorser. But he might write over it "without recourse," or other words which would prevent resort to him, and such words would bind not only the writer, but his indorsee, and all subsequent indorsees. Indeed, we should say that a holder may orally limit the purpose to which a transferee may use a note, so as to bind the transferee. If, for example, the holder is first indorser, and there is a second indorser, and both indorsements are in blank, if the holder deliver it to a person expressly to be discounted for the use of the holder, that person would have no right to hold the note in payment or security of any claim he may have against the second indorser.(*y*)

The only reason for which a transferee can in ordinary cases desire that the indorsement should be in full, is to guard against loss, by accident or theft. For negotiable paper, payable to bearer, and lost by or stolen from the owner, and transferred for value to an innocent holder, becomes his property.(*z*) To pre-

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to the third indorsee, and sued the maker and recovered. But we should think it might have been objected that the plaintiff had been discharged, and, being under no obligation to pay the third indorsee, by his voluntary payment acquired no claim against the maker.

(*y*) Delauney *v.* Mitchell, 1 Stark. 439.

(*z*) Peacock *v.* Rhodes, 2 Doug. 633, and cases *supra*, Vol. I. p. 280. See also *post* chapter on Lost Note.

vent this, the transferee may have the indorsement filled, — by himself or by the indorser, — and the note made payable only to him, and then no one can acquire property in the paper without his indorsement.

An indorser gains nothing in ordinary cases by simply indicating to whom he indorses, and to whom the note is payable. But he may wish to lessen and limit his liability, or to put a condition upon it, or to preserve his property in the paper; and anything of this kind he may do by the appropriate indorsement.

If, for example, he is willing to transfer the paper, but is not willing to respond for it, he writes over his name "without recourse," or any equivalent words or phrases which distinctly express his purpose. So, if he sees fit to enlarge his liability, he may do so by saying, "demand and notice waived," or, "without protest," which last phrase is very unusual here, or by what else of the kind he chooses to write. The effect of such words is fully considered elsewhere.

The indorser may also affix a condition to his indorsement; and we have already seen that the negotiability of the paper is not thereby prevented, but the property in the paper is not transferred until that condition is performed; and if the acceptor or maker pay the amount of it to the indorsee at maturity, the condition not having been performed, the indorser will recover it of the acceptor or maker.(*a*)

So the indorser may transfer it in trust; and this trust may be either for another or for himself; and if it be expressed with sufficient distinctness by the indorser, it is notice to everybody, and no one can take it except subject to that trust. Thus, if the indorsement be, "Pay to A for the use of (or on account of, or for the benefit of, or in trust for) B," A only can indorse; and if the circumstances attending a transfer by A's indorsement are such that his indorsee believes, and is justified in believing, that A indorses it over in execution of his trust, or for the benefit of B, he will hold it, although A defrauds B. But if A indorsed it in payment of or as security for his private debt, the indorsee should have inferred that it was indorsed for A's own benefit, and then he is affected by the fraud, and cannot hold the paper or its pro-

(*a*) Robertson *v.* Kensington, 4 Taunt. 30.

ceeds.(*b*) So if he says, "Pay to A or order for my use," and A discounts it at a bank with which he has an account, and the bank collects it, they cannot apply the proceeds to the balance due from A to them, but must pay them over to the indorser.(*c*) The words may be, "The proceeds must be credited to A. B.," or any other words which with sufficient distinctness point out a party other than the indorsee, for whose exclusive use and benefit the indorsement is made.(*d*) But if the direction is, "Pay to A. B.," and then it goes on to state the consideration on which the indorsement is made to A. B., this is not restrictive, and A. B., or any subsequent indorsee, has the full power of indorsement.(*e*)

It has been held, that, even in an action against an indorser on a common indorsement, the defendant may qualify the effect of his indorsement by putting in evidence of an agreement, in writing, between him and the plaintiff.(*f*) It is obvious, however, that no such agreement could affect the rights of an indorsee, without notice or knowledge of it.

It seems that an indorsement may be made to an officer by words describing his office, and not by personal name; and that a person holding the office when the indorsement was made acquires, by the indorsement and delivery to him, an indefeasible interest in the paper, and may indorse it after he leaves the office.(*g*)

(*b*) Treuttel *v.* Barandon, 8 Taunt. 100, 1 J. B. Moore, 543.

(*c*) See *supra*, Vol. I. p. 119, note *b*.

(*d*) Ancher *v.* Bank of England, 2 Doug. 637.

(*e*) Potts *v.* Reed, 6 Esp. 57. See also Haussoullier *v.* Hartsinck, 7 T. R. 733.

(*f*) Phelps *v.* Foot, 1 Conn. 387.

(*g*) In Soares *v.* Glyn, 8 Q. B. 24, a bill of exchange was indorsed "to the Treasurer General of the Royal Treasury of Portugal." At the time of the indorsement, one Joaquim Conte held the office and received the bill. The government of Portugal then existing was afterwards subverted by an enemy, and Conte displaced. After this he indorsed the bill, and his indorsement was held to be sufficient. There are peculiar circumstances in the case which may perhaps qualify the legal inference to which it seems to lead. The bill was part of a loan raised by Don Miguel, whom Don Pedro drove away. Don Pedro obtained possession of the bill, and induced Conte to indorse it for his benefit. So that the bill, which was originally indorsed for the benefit of the government of Portugal, was in fact collected for the benefit of a subsequent government of the same country. See also cases *supra*, Vol. I. pp. 171–174.

SECTION VI.

OF THE RELATIONS, RIGHTS, AND OBLIGATIONS OF THE INDORSER AND INDORSEE.

MANY topics which might be considered under this head have been already treated of, or will be in subsequent pages.

The act of indorsement, either in blank or in full, without qualification, forms a new contract with the indorsee,(*h*) which either constitutes or implies a promise that the paper is due and payable according to its tenor; that the acceptor, maker, or previous indorsers will pay the same at maturity, when duly called upon and notified, and that the indorser will pay the same if they do not; and this promise is made, not only to the immediate indorsee, but to every subsequent indorsee. It is an original undertaking, and not a promise to pay the debt of another within the statute of frauds.(*i*)

The law presumes this contract from the indorsement; but how far this is a presumption *juris et de jure*, or absolute, and as unrebuttable as if it were all written out, or only *prima facie*, it is not easy to say. That it is absolute between remote parties in many cases in which it is not so between immediate parties is quite certain; but there may be some doubt how far it is so between immediate parties. That the consideration, of which the indorsement is *prima facie* evidence, may be inquired into is certain; but so it would if the especial consideration were particularly set forth, because in relation to that the note would be only a receipt, and that may always be affected by evidence.

The exact question is this: Suppose over an indorsement an agreement is written out in full, setting forth exactly the same promises which the law implies from a blank indorsement; suppose, further, that, in an action by the indorsee upon this indorsement, evidence was offered by either party which was inadmissible on the ground that it varied a written agreement; would the same evidence be inadmissible in the same action, if the indorsement were in blank? We are strongly disposed to say that it

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(*h*) See *infra*, p. 25, note *o*.

(*i*) Turnbull *v.* Trout, 1 Hall, 336

would be so, as a general rule, and to consider those cases in which such evidence would seem to be admissible as exceptions.

It is certain that, if one promises in writing to pay money at a certain time, evidence cannot be received that the actual agreement was for payment at another; but it is also law, that if one promises to pay money, no time being specified, the law presumes that the money is to be paid on demand; and this presumption is absolute, and no evidence of a fixed time can be received.(*j*) Nor can any evidence be admitted to prove how parties understood a written contract, unless fraud enter into the question.(*k*)

Whether the property passed by the indorsement, or what was the purpose of the indorsement, may undoubtedly be shown, as between the parties to the indorsement. As if the payee indorses it to his agent merely to enable him to collect it, and the agent, as indorsee, not only collects, but claims to retain the proceeds as his property. There may be a case in which such agent claims the proceeds as a question of right, and not fraudulently; but the indorser could doubtless show what the purpose of his indorsement was, if he did not seek to affect thereby a third party without notice. That is, he could give to his blank indorsement the effect of one with the words, "Pay to A, as my agent, and for my use."

The same principle, perhaps, may be applied to those cases in which it is held that, if there be an agreement (written or oral) between the indorser and indorsee that the indorsee shall not sue the indorser, but only the acceptor or some other party, this agreement is a good defence to an action which violates it; for here the agreement proves that the indorsement was intended only to transfer the paper, and give a right of action against other parties, without liability on the part of the indorser.(*l*) But it must be confessed that these cases are not easily reconciled with any absolute presumption as to the contract of indorsement.(*m*) And evidence to give to a blank indorsement the

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(*j*) Warren *v.* Wheeler, 8 Met. 97.

(*k*) Bigelow *v.* Collamore, 5 Cush. 226; Harper *v.* Gilbert, 5 Cush. 417.

(*l*) Pike *v.* Street, Moody & M. 226; Wright *v.* Latham, 3 Murph. 298; Johnson *v.* Martinus, 4 Halst. 144; M'Donough *v.* Goule, 8 La. 472.

(*m*) In Goupy *v.* Harden, 7 Taunt. 159, an agent who purchased foreign bills for his principal, and indorsed them to him without qualification, was held liable to such principal on his indorsement.

effect of express waiver of demand and notice, by showing an oral agreement to that effect at the time of the indorsement, has been distinctly rejected.(*n*)

An indorsement being a new and independent contract, every indorser of a bill makes a new contract, and will be considered by the law as the drawer of a new bill, if this be necessary in order to enforce the obligations he assumes.(*o*) The drawer of a bill is liable, as we have seen, only on default of the acceptor, but the maker of a note is liable in the first instance. Hence the indorser of a note does not stand in the situation of maker to his indorsee.(*p*)

An indorser may qualify the contract as it stood before his indorsement, by annexing such terms as he will; (*q*) and not only so, if he indorses in blank, the contract he makes may be very different from that which he received. Thus, an indorsement admits the signature, and the capacity to sign, of every prior party.(*r*) And it admits the capacity to indorse of every former indorser, *at that time*, although he might be incapacitated by infancy or otherwise. If, for example, A makes a note to B or order, and B's name is forged and the note sold to C, C cannot sue B upon this indorsement, nor can he sue A. As to him the note is void, although B may sue A. But if C indorses it to D, either D, or any person to whom it is subsequently indorsed, may sue C. So if the payee and indorser were a married woman, and therefore incapacitated from making an indorsement, or an infant, who might avoid his indorsement and deny his liability,

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(*n*) Barry *v.* Morse, 3 N. H. 132. But see *contra*, Fuller *v.* McDonald, 8 Greenl. 213.

(*o*) Young *v.* Bryan, 6 Wheat. 146; Allen *v.* Walker, 2 M. & W. 317; 5 Dowl. P. C. 460; Claxton *v.* Swift, 2 Show. 494, 501, Comb. 32, 3 Mod. 86, Skin 255; Anonymous, Skin. 343; Lake *v.* Hayes, 1 Atk. 281; Williams *v.* Field, 3 Salk. 68. In Penny *v.* Innes, 1 Cromp. M. & R. 439, 5 Tyrw. 107, the payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement the defendant indorsed the bill, and then the plaintiffs indorsed it. Held, that the defendant's indorsement was equivalent to a new drawing by the defendant, and that he was liable to be sued upon the bill by the plaintiffs. In Eccles *v.* Ballard, 2 McCord, 388, it was held that an indorser on a note payable to bearer was liable as upon a new bill to the bearer. See also Hodges *v.* Steward, 12 Mod. 36, 1 Salk. 125.

(*p*) Gwinnell *v.* Herbert, 5 A. & E. 436, 6 Nev. & M. 723. See Dean *v.* Hall, 17 Wend. 214.

(*q*) Smallwood *v.* Vernon, 1 Stra. 478.

(*r*) Lambert *v.* Pack, 1 Salk. 127; Lambert *v.* Oakes, 1 Ld. Raym. 443, Holt, 117 Critchlow *v.* Parry, 2 Camp. 182; Woodward *v.* Harbin, 1 Ala. N. S. 104.

if the indorsee indorsed it over he would be liable, and could not defend himself by showing that the note did not come properly to him, nor that the former indorser was not liable to him.(*s*) In general, an indorsee who sues his indorser is not obliged to prove the prior indorsements, because, even if forged, voidable, or void, he still may maintain his action. These principles attach to negotiable paper which was stolen or lost, and afterwards passed for value into the hands of a *bona fide* holder.(*t*)

When the paper can be transferred only by indorsement, the taker of the paper takes with it the risk that the indorsements through which he makes title were made by one who had no power to make the indorsement and transfer by it the paper; but this is the whole of his risk.(*u*)

A note which has many indorsements in full, and one which is in blank, is still transferable by delivery, whether that in blank be first or last or intermediate, because a holder may fill up that indorsement directly to himself.(*v*) And the rule of law applicable to paper transferable by delivery attaches to such a note.(*w*)

The indorsee has all the rights of his immediate indorser, and sometimes more. If A makes a note to B for a consideration which wholly fails before its maturity, and B indorses this note to C, and A gives C notice of this failure before the indorsement, C is subject to the same defence which A could have made against B. But if C indorses it for value to D, who has no notice, D is not subject to this defence.(*x*) And if A had not given notice to C, but had given notice to D, D would nevertheless not be subject to this defence. For A was liable to pay the

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(*s*) See Erwin *v.* Downs, 15 N. Y. 575, cited *supra*, Vol. I. p. 277, note *j*.

(*t*) See *supra*, Vol. I. p. 280, and *post*, chapter on Lost Bill or Note

(*u*) See *supra*, Vol. I. p. 277.

(*v*) Smith *v.* Clarke, Peake, N. P. 295.

(*w*) See *supra*, Sect. V.

(*x*) See *supra*, Vol. I. pp. 203 - 211. In Wilson *v.* Lazier, 11 Grat. 477, a bill in equity was brought by the maker of a note against the payee, second indorser, and the holder for value, on the ground of a failure of consideration. It appeared that, as between the maker and the payee, the consideration had wholly failed, that the payee had transferred it without consideration to the second indorser as a gift, and that the latter had transferred it for value to the holder. It was held, that, though the maker was liable to the holder, yet he was entitled to recover the amount so paid from the payee, or, upon his inability to pay, to recover of the second indorser the amount received by him on the note.

note to C, and D takes all C's rights. The reason and equity of this are obvious; for as A was properly obliged to pay the note to C, it is immaterial to him whether the note remains in C's hands or passes to another. Hence, a holder whose own title might be defeated by various defences or equities may set up the better title of his indorser, and rely upon it.(*y*) A note which is post-dated and negotiated before the day of its date is recoverable by the indorsee, its transfer before the day of its date affording no cause of suspicion so as to put the indorsee on inquiry, and subject him to equities existing between the original parties.(*z*)

In the case of accommodation paper, it is obvious that the indorsee takes more than the rights of his indorser. For one who indorses a note to accommodate the payee cannot be sued by the payee, because no consideration passes; (*a*) but he may by the payee's indorsee, even with notice of the absence of consideration, because the note was made for this very purpose.(*b*)

The principle is a general one, that a person making (*c*) or indorsing (*d*) a note, or drawing,(*e*) accepting,(*f*) or indorsing a bill, or becoming liable in any way on negotiable paper,(*g*) for the benefit of another person, is liable to a third person, even with notice of the want of consideration, but is not to the person for whose benefit the paper was signed.(*h*)

If, however, the accommodation is given for a particular purpose, and that is known to the holder of the paper at the time he takes it, a misappropriation of the paper would release the party giving the accommodation from all responsibility.(*i*) And if the

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(*y*) See *supra*, Vol. I. p. 261, note *q*.

(*z*) Brewster *v.* McCardel, 8 Wend. 478.

(*a*) Thompson *v.* Clubley, 1 M. & W. 212; Whitwell *v.* Crehore, 8 La. 540.

(*b*) Haly *v.* Lane, 2 Atk. 181; Brown *v.* Mott, 7 Johns. 361; Yeaton *v.* Bank of Alexandria, 5 Cranch, 49; Violett *v.* Patton, 5 Cranch, 142; Thompson *v.* Shepherd, 12 Met. 311; Molson *v.* Hawley, 1 Blatchf. C. C. 409.

(*c*) Lord *v.* Ocean Bank, 20 Penn. State, 384; Montross *v.* Clark, 2 Sandf. 115.

(*d*) See *supra*, notes *a* and *b*.

(*e*) Walwyn *v.* St. Quintin, 1 Bos. & P. 652.

(*f*) Fentum *v.* Pocock, 5 Taunt. 192; Kemp *v.* Balls, 10 Exch. 607; Smith *v.* Knox, 3 Esp. 46; Grant *v.* Ellicott, 7 Wend. 227.

(*g*) As surety. Bank of Rutland *v.* Buck, 5 Wend. 66.

(*h*) See *supra*, note *a*.

(*i*) Evans *v.* Kymer, 1 B. & Ad. 528; Delauney *v.* Mitchell, 1 Stark. 439; Roberts *v.* Eden, 1 Bos. & P. 398; Buchanan *v.* Findlay, 9 B. & C. 738; Key *v.* Flint, 8

persons to whom a bill is indorsed for a special purpose do not use it for this purpose, and become bankrupt, their assignees are bound to deliver it up.(*j*)

But what amounts to a misappropriation is, as our notes show, a question of some difficulty.(*k*) Generally, at least, the person giving the accommodation must show that he has been injured by the misappropriation.(*l*) And the mere fact that the note was intended to be discounted at a particular bank does not prevent the parties for whose benefit it was given from making other use of it.(*m*) If, however, the note was to be discounted for the purpose of taking up other paper of the person giving the accommodation, or was otherwise intended for his benefit, the failure to have it discounted would be a misappropriation,(*n*) and if the bank refused to discount it, the holder should return it to the accommodation maker or indorser.(*o*) It is not, however, a misappropriation, on the bank's refusing to discount, to get it discounted by a private person, if the proceeds are duly applied to the intended purpose.(*p*)

If the holder is a *bona fide* holder, and was ignorant of such misappropriation, he may of course recover;(*q*) unless the per-

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Taunt. 21; Cartwright *v.* Williams, 2 Stark. 340; Brown *v.* Taber, 5 Wend. 566; Woodhull *v.* Holmes, 10 Johns. 231; Small *v.* Smith, 1 Denio, 583.

(*j*) Ex parte Frere, Mont. & M. 263.

(*k*) In Bank of Rutland *v.* Buck, 5 Wend. 66, a person signed a note as surety for the accommodation of other parties to it, the note to be discounted at a certain bank. The bank refused to discount, and the principals passed it off as collateral security for the payment of a judgment. This was held not to be a misappropriation. In Wardell *v.* Howell, 9 Wend. 170, the law is accurately stated as follows: "Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that it was not affected in the precise manner contemplated at the time of its creation. . . . . But where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it, against an accommodation indorser, without showing that he received it in good faith in the ordinary course of trade, and paid for it a valuable consideration." See also Mohawk Bank *v.* Corey, 1 Hill, 513.

(*l*) Crook *v.* Jadis, 5 B. & Ad. 909; Uther *v.* Rich, 10 A. & E. 784.

(*m*) Bank of Rutland *v.* Buck, 5 Wend. 66; Mohawk Bank *v.* Corey, 1 Hill, 513; Grandin *v.* Le Roy, 2 Paige, 509.

(*n*) Wardell *v.* Howell, 9 Wend. 170.

(*o*) Kasson *v.* Smith, 8 Wend. 437; Denniston *v.* Bacon, 10 Johns. 198.

(*p*) Powell *v.* Waters, 17 Johns. 176; Bank of Chenango *v.* Hyde, 4 Cowen, 567.

(*q*) See *supra*, Vol. I. pp. 279, 280, chapter on Holder. In Decker *v.* Mathews, 2 Kern. 313, it was held that an accommodation maker of a negotiable promissory note can maintain an action for its conversion against a person who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value

son from whom he took the paper had no power to pass any title in it by indorsement.(*r*) But he cannot recover, if he took the paper with knowledge of the circumstances of the case.(*s*)

The fact that the paper was misappropriated can only be taken advantage of by the persons giving their names as accommodation parties. Thus the makers of a note indorsed by an accommodation indorser cannot, on being sued, defend on the ground that they negotiated the note contrary to its terms.(*t*)

We have already seen that paper which is dishonored loses much of the character of negotiable paper. But a person who takes accommodation paper after its dishonor, in good faith and for value, may recover from the accommodation indorser or other party lending his name and credit.(*u*) So, too, as we have seen, the holder of an accommodation note, without restriction as to the mode of using it, may transfer it either in payment, or as collateral security for an antecedent debt; and the fact that he did so will be no defence to the indorser.(*v*)

If the name of any party be erased by the holder by mere accident or mistake, this does not discharge such party.(*w*) But

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(*r*) Smith *v.* De Witts, 6 Dowl. & R. 120, s. c. *nom.* Smith *v.* De Wruitz, Ryan & M. 212.

(*s*) Treuttel *v.* Barandon, 8 Taunt. 100, 1 J. B. Moore, 543. In Brown *v.* Taber, 5 Wend. 566, the holder did not have actual knowledge of the misappropriation, but knew such facts and circumstances as should have put him on inquiry. Held that he could not recover. See *supra*, Vol. I. pp. 258, 259.

(*t*) Wardell *v.* Hughes, 3 Wend. 418.

(*u*) Charles *v.* Marsden, 1 Taunt. 224; Carruthers *v.* West, 11 Q. B. 143; Sturtevant *v.* Ford, 4 Man. & G. 101; Renwick *v.* Williams, 2 Md. 355; Thompson *v.* Shepherd, 12 Met. 311. See *contra*, Whitwell *v.* Crehore, 8 La. 540.

(*v*) See *supra*, Vol. I. p. 226, note *m*. But where a note was indorsed for the accommodation of the makers, who were then in good credit, but who became insolvent before the note was negotiated, and were directed by the indorser not to part with the note, and promised they would not, but afterwards passed it to the plaintiff with full knowledge of these facts, in satisfaction of a debt due from them to the plaintiff, which covered part of the amount of the note, receiving from the plaintiff the balance in cash, it was held that the plaintiff could not recover from the indorser.

(*w*) Raper *v.* Birkbeck, 15 East, 17; Novelli *v.* Rossi, 2 B. & Ad. 757. In Wilkinson *v.* Johnson, 3 B. & C. 428, 5 Dowl. & R. 403, a bill of exchange, bearing among others the supposed indorsement of H. & Co., bankers, at Manchester, was presented for payment in London, and dishonored. At the request of the notary who presented the bill, the London correspondent of H. & Co. took up the bill for their honor, but struck out the indorsements subsequent to that of H. & Co., and the money was paid to the holder of the bill. The same morning, the London agent, having discovered that the signatures of the drawer, the acceptor, and H. & Co. were forgeries, sent

an intentional striking out of any name operates a full discharge of that party, and also of all those who could have looked to that party had they been compelled to pay the note. A holder has of course always the power of thus striking out what name he will, as he may all the names, or put the note in the fire if he will. But the rule above stated prevents his exercising this right of erasure to the injury of other persons. Thus the indorsee of a note with six indorsers in blank may sue the third indorser, and strike out the fourth and fifth and sixth, for the third could never look to them.(*x*) But if he strikes out the name of the second or first at any time before or after action, this discharges the third, because it deprives him of his remedy against the party whose name is erased.(*y*) So if an indorser comes into possession of the bill or note again, he is regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of such bill, and is entitled to recover, notwithstanding there may be on it one or more indorsements in full subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill or not as he may think proper.(*z*)

It is undoubtedly true, that when the indorser of a note becomes again a holder of it, by a subsequent indorsement to himself, and the question arises, What rights such indorsement gives to him, the authorities have undergone some change. That he may consider himself as in possession by his former title seems to be quite clear; and the strongest American authority denies, as we have said, any necessity for his showing a receipt by the indorsers of payment from him, or any especial transfer to himself,

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notice thereof to the person to whom he had paid the money, and demanded it back; and that notice was sent so early that notice of the dishonor might have been sent to the indorsers by the same day's post. The court held that the erasure of the indorsements did not deprive the holder of his remedy against the prior indorsers, and that the agent, having paid the money by mistake, was entitled to recover it back.

(*x*) Ritchie *v.* Moore, 5 Munf. 388. See also cases, *infra*, note *z*.

(*y*) Curry *v.* Bank of Mobile, 8 Port. Ala. 360.

(*z*) Dugan *v.* United States, 3 Wheat. 172. So in United States *v.* Barker, 1 Paine, C. C. 156, it was held that, where the indorsee of a bill of exchange, whether as agent or owner, returns it after protest to the last indorser, the latter may sue upon it in his own name, and at the trial strike out the last indorsement, though it be in full. See Bell *v.* Morehead, 3 A. K. Marsh. 158, and cases *supra*, Vol. I. pp. 357, 358, note *d*. *Contra*, Craig *v.* Brown, Pet. C. C. 171.

more than is shown by the re-indorsement. He therefore stands as to the parties before him as if he had continued to be the holder, and had never indorsed it. But if he relies upon the subsequent indorsements as making those parties liable to him, he is in danger of the answer that he is liable to them. The earlier cases stood on this obvious ground. A makes a note to B, B indorses to C, C to D, D to E, and E to C. If C sues E or D as indorsing to him, either of them acquires by payment a right to sue him as their indorser, and therefore, to prevent such circuity of action, it was held that he could not sue them. But the later cases have greatly modified this rule. Without especial facts and circumstances, the case would stand as formerly; but where these facts exist, they may be shown, and would maintain C's action against E. If, for example, it could be proved that, by the original bargain, and for sufficient consideration, E indorsed it over to C for the purpose of being surety to him as indorser, without looking over to him for indemnity, this, although not specially stated in the declaration, would maintain an action by C, as indorsee, against E. Nor does it seem that this is anything more than a reasonable application of the rule, that every party to negotiable paper may be considered as drawing a new note or bill, if the merits of the case require.(*a*) If, however, he declares on his original title, he will, it seems, be held to rely upon that alone, and will not be permitted to stand upon his subsequent title, or upon any events which accrued after he had indorsed the note.(*b*)

Whether, if a note be indorsed to A, but in fact, though not in form, to A as the agent of B, and for B's use, B can maintain an action in his own name, may not be quite settled. But we should apprehend that the principles of negotiable paper would require that the action should be in the name of A, although the contrary has been distinctly held by the Supreme Court of the

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(*a*) See cases cited in note *z*, *supra*, p. 30, and cases cited Vol. I. pp. 357, 358. In Hanks *v.* Dunlap, 10 Rich. Eq. 139, the payee indorsed the note in blank, and delivered it to B., his agent, to be discounted in bank. B. owed W. for money lent to game with, and, in consideration thereof, transferred the note to W., who, before it fell due, transferred it to D., one of the makers, for value and without notice. The payee brought a bill in equity against the holder to compel payment of the note. Held, that the maker was entitled to retain possession of it, and was not liable to the payee.

(*b*) Bartlett *v.* Benson, 14 M. & W. 733.

United States,(*c*) where the principal was the United States, and the indorsee the Treasurer. This rested, in some degree at least, on the principle, that, as the Treasurer, who had indorsed his name, and afterwards, on dishonor, received back the note officially, could not be sued, so neither ought he to sue. In general, we see no objection to requiring the action to be in the name of the agent, because the principal would not then be subject to any defences or equities, to which he had not subjected himself by his own fault, or at least his own act, in appointing and authorizing his agent to take the indorsement.

If a transferee of a bill by indorsement sends it back to the indorser as worthless, this makes the indorsement invalid. And he acquires no new title to the note by merely getting possession of it without a new transfer to him; but there need not be a new indorsement,(*d*) because the former indorsement is capable of becoming again valid, by ratification or confirmation.

It is a universal rule, that every one who in any way becomes a surety for another is discharged from this secondary obligation, if the creditor does not hold the principal debtor to his primary obligation with proper strictness. He may give him what indulgences he will, but he does this at his own risk, and therefore if he chooses to give them, he discharges the surety. This rule applies also to an indorser, who is in some degree a surety. And we shall treat of it more specifically in a subsequent chapter on Payment, Satisfaction, and Release.

(*c*) Dugan *v.* United States, 3 Wheat. 172. See also United States *v.* Barker, 1 Paine, C. C. 156.

(*d*) Cartwright *v.* Williams, 2 Stark. 340.

CHAPTER II.

OF TRANSFER BY DELIVERY OR ASSIGNMENT.

SECTION I.

WHAT BILLS OR NOTES ARE TRANSFERABLE BY DELIVERY.

ALL bills and notes payable to bearer, or indorsed to bearer, or indorsed in blank so that a holder may add either his own name, or any other name, or the words "to bearer," are, as we have seen, transferable by delivery. Bank-bills are the most familiar examples of this. The rule extends, however, to all negotiable paper. How much further it goes may not be so certain. We shall, in another connection, treat of the bonds of railroad companies or other corporations. These are continually bought and sold in the market, and pass by delivery only, like any goods or chattels. These, although usually called bonds, are not always sealed, and the coupons attached (which are promises or due-bills for interest) never are. Where the seal is absent, the words of negotiability may be as well inserted, and to the same effect as in ordinary notes.(*a*)

(*a*) Gorgier *v.* Mieville, 3 B. & C. 45; Lang *v.* Smyth, 7 Bing. 284; Wookey *v.* Pole, 4 B. & Ald. 1; Glyn *v.* Baker, 13 East, 510; Carr *v.* Le Fevre, 27 Penn. State, 413; Morris Canal & Banking Co. *v.* Fisher, 1 Stockt. Ch. 667; Mechanics' Bank *v.* N. Y. & N. H. R. Co., 3 Kern. 599; Craig *v.* City of Vicksburg, 31 Missis. 216; Maddox *v.* Graham, 2 Met. Ky. 56; Connecticut & Passumpsic Rivers R. Co. *v.* Newell, 31 Vt. 364, per *Redfield*, C. J. In Gorgier *v.* Mieville, 3 B. & C. 45, it was held that a bond, which was an acknowledgment by the king of Prussia that he and his successors were bound to every person who should for the time being be the holder of the bond for the payment of the sum mentioned therein and interest, in a certain mode and at certain periods, was transferable by delivery. The same principle has been extended to exchequer bills, Wookey *v.* Pole, 4 B. & Ald. 1; to State bonds, Delafield *v.* State of Illinois, 2 Hill, 159; to city and county bonds, Craig *v.* City of Vicksburg, 31 Missis. 216; Maddox *v.* Graham, 2 Met. Ky. 56; Clapp *v.* County of Cedar, 5 Iowa, 15; to railroad bonds, Connecticut & Passumpsic Rivers R. Co. *v.* Newell, 31 Vt. 364; Carr *v.* Le Fevre, 27 Penn. State, 413; and so, doubtless, to all bonds payable to bearer and intended to

Although bonds and coupons made payable to bearer, as is usually the case, may not be commercial paper in the strict sense of the law merchant, yet they so far partake of the nature of negotiable paper, that, when upon their face they bear evidence of genuineness, and there is nothing to excite suspicion, a *bona fide* purchaser for value, without notice of any prior defect in the title to them, may enforce them independent of all equities between the original parties, or even though they were not valid as between them.(*b*)

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be negotiable. In California, a banker's certificate of deposit is held a negotiable security. Welton *v.* Adams, 4 Calif. 37. See Kilgore *v.* Bulkley, 14 Conn. 362. See also, as to dividend warrants, Partridge *v.* Bank of England, 9 Q. B. 396; as to dock warrants, Zwinger *v.* Samuda, 7 Taunt. 265; Lucas *v.* Dorrien, id. 278; as to bills of lading, Lickbarrow *v.* Mason, 5 T. R. 683; Saltus *v.* Everett, 15 Wend. 475; Gurney *v.* Behrend, 3 Ellis & B. 622. In Thompson *v.* Dominy, 14 M. & W. 403, *Alderson*, B. said: "Because, in Lickbarrow *v.* Mason, a bill of lading was held *negotiable*, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only." See also Howard *v.* Shepherd, 9 C. B. 297, 319; Sanders *v.* Vanzeller, 4 Q. B. 260, 295; Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, 216; Dows *v.* Cobb, 12 Barb. 310. But it may be shown that coupons, though payable to bearer, are by the custom of merchants transferable only in a certain manner, as, for instance, only in connection with the certificates to which they were attached, and then it is a proper question for the jury to determine whether these instruments passed by delivery separately. Lang *v.* Smyth, 7 Bing. 284. It seems, however, that it is the province of the court to decide on the negotiability of these instruments, except in cases where the law merchant is doubtful. Myers *v.* York & Cumberland R. Co., 43 Maine, 232. This latter case was an action by the assignee of the following instrument: —

"Coupon { York & Cumberland R. R. Company. } Bond Certificate, No. 6. { No. 149.

"On the tenth day of February, 1854, the York & Cumberland Railroad Company will pay thirty dollars on this coupon, at the office of said company, in the city of Portland, Maine. Nath'l J. Herrick, Treasurer." It was held, that, although the bond certificate referred to, with which it was delivered, was negotiable, the coupon, never having been annexed or appended to it, and containing in itself no negotiable words, could not, without the interposition of legislation, or the proof of usage, be considered as possessing an independent negotiable character. Therefore the plaintiff was nonsuited.

(*b*) Craig *v.* City of Vicksburg, 31 Missis. 216; Maddox *v.* Graham, 2 Met. Ky. 56; Morris Canal & Banking Co. *v.* Fisher, 1 Stockt. Ch. 667; Mechanics' Bank *v.* N. Y. & N. H. R. Co., 3 Kern. 599; Zabriskie *v.* Cleveland, &c. R. Co., U. S. C. C. Northern District of Ohio, 10 Am. Railw. Times, No. 15, 23 How. 381. Mr. Justice *McLean*, delivering the opinion of the Circuit Court, said, that if on such paper the equities are open as between the persons who created it, its negotiability would be destroyed and its purpose defeated; and that if against the holders of the bonds technical objections can be raised, as to the mode of their being issued, when upon their

If they are sealed, there is more difficulty. If made payable to order, or to assigns, or to holder or bearer, they must still, by the general law of specialties, be sued in the name of the original obligee, or, if in the name of the holder, then subject to equitable defences; and only a new principle, or an important modification of an old one, would permit them to be sued in the name of the holder, and would liberate them in his hands from equitable defences.(*c*)

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face there is nothing to excite suspicion, but everything to secure confidence, it would destroy all reliance in such paper. In State of Illinois *v.* Delafield, 8 Paige, 527, 2 Hill, 159, 177, State bonds or stocks had been prepared and executed by the officers having due authority of law; the purpose being to sell them in order to raise funds for the construction of a canal. They were put into the hands of agents for sale, who sold and delivered them in violation of an express provision of the law which authorized their creation. It was held by the Chancellor — and, on appeal, by the Court of Errors — that the bonds would be obligatory upon the State of Illinois in the hands of *bona fide* holders; and on that ground, the defendant, Delafield, was restrained from selling or disposing of them. In Bank of Rome *v.* Village of Rome, 19 N. Y. 20, this decision was approved, and it was held that bonds issued by the Village of Rome, under its corporate seal and payable to bearer, in aid of a railroad company, and which were wrongfully delivered by the commissioners of the railroad fund to the company before the performance on the part of the company of a condition precedent required by the act authorizing the issue of the bonds, were negotiable instruments in such a sense as to exempt them, in the hands of a *bona fide* holder, from a defence which might be available against the railroad company. And where the bonds of a city or county have been issued in aid of a railroad corporation, it is no defence to an action upon one of these bonds or upon a coupon when brought by an innocent holder, that the company, since the issuing of the bond, has become insolvent, or has been dissolved. Maddox *v.* Graham, 2 Met. Ky. 56; Clapp *v.* County of Cedar, 5 Iowa, 15. See also Commissioners of Knox County *v.* Aspinwall, 21 How. 539; Royal British Bank *v.* Turquand, 6 Ellis & B. 327. But certificates of stock in a corporation were held by the Court of Appeals of New York, in the Schuyler case, not to be negotiable; or at least, that the assignee of a certificate, without any transfer in the corporation's books, acquires only the title of the assignor. Mechanics' Bank *v.* N. Y. & N. H. R. Co., 3 Kern. 599.

(*c*) Hibblewhite *v.* M'Morine, 6 M. & W. 200, per *Parke*, B.; the law does not permit a deed to be made transferable and negotiable like a bill of exchange or exchequer bill. See Buckner *v.* Greenwood, 1 Eng. Ark. 200. The same principle holds with regard to promissory notes under seal. Clark *v.* Farmers' Manuf. Co., 15 Wend. 256; Kinniken *v.* Dulaney, 5 Harring. Del. 384. In Georgia, it is held that a note, according to the usage and custom of merchants, does not lose its negotiable quality by having a seal annexed to it. Porter *v.* McCollum, 15 Ga. 528. The court say: "It would seem from adjudicated cases that the negotiability of a paper by delivery properly depends upon its terms, rather than upon the fact of its being or not being under seal. As a general rule, bonds, specialties, &c. (especially was this true at the time of the enactment of the statute of Anne) are not intended to be negotiated by delivery, — are not designed to pass from hand to hand; and hence, no doubt, the other general rule which we find in the books, that specialties are not negotiable by

If made without the name of any owner or obligee inserted, but a blank instead, or with a name only in pencil, as certificates of stock often are, but bonds as we suppose rarely or never, with the intent that a holder may, whenever it becomes necessary, insert his own name in the original blank, or in that left by rubbing out the pencil name, all this is so irregular that it would not be easy to find a rule of law to sanction it, or to enforce rights built upon such title.(*d*) But the usage may be sufficient to induce and enable the courts to protect these transfers in some way.

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delivery. But there seems to be no sufficient reason why a specialty, that is to say, an instrument under seal, purposely framed and intended to pass by delivery, should not be negotiable." This case was decided on the authority of Gorgier *v.* Mieville, 3 B. & C. 45. In several States bonds under seal are made negotiable by statute. In Massachusetts, "bonds and other obligations under seal for the payment of money purporting to be payable to the bearer, or some person designated as bearer, or payable to order, issued by any corporation or joint-stock company, shall be negotiable in the same manner and to the same extent as promissory notes." Gen. Stats. 1860, p. 293, c. 53, § 6. In Maryland, the assignee, by writing of any bond or specialty, may maintain an action thereon in his own name. Code 1860, Vol. I. p. 43. In Tennessee, every bond, bill, or note, whether sealed or not, is declared negotiable in the same manner as promissory notes. Code 1858, p. 399. So in Georgia. Cobb's New Dig. 1851, p. 519. In Pennsylvania, it is provided that all bonds, specialties, and notes in writing, payable to the order of any person, or to his assigns, may be sued in the name of the assignee. Purdon's Dig. 1857, p. 93. Subject, however, to equities. Bury *v.* Hartman, 4 S. & R. 175; Northampton Bank *v.* Balliet, 8 Watts & S. 311, 318. In other States bonds are declared negotiable without specifying whether sealed or not, as in Ohio bonds to the order of any person, or to bearer or assigns, are negotiable. R. S. 1854, c. 74, § 1, p. 575. So in Kentucky, 1 R. S. 1860, p. 268, c. 22, § 4; and the assignee of bonds may sue thereon in his own name in Virginia, Code 1849, p. 147; Mississippi, R. Code 1857, p. 355; Texas, Oldham & White's Dig. 1859, p. 51; Alabama, Code 1852, § 2129; Arkansas, Dig. of Stats. 1858, p. 157; Florida, Thompson's Dig. 1847, p. 348; California, Wood's Dig. 1858, p. 75; Illinois, Comp. Stat. 1858, Vol. I. p. 291; New Jersey, R. S. p. 801; and so perhaps in some other States. In Maine, it is provided that coupons for interest of railroad bonds may be assigned by delivery, and that the assignee may sue thereon in his own name. R. S. 1857, c. 51, § 34.

(*d*) Such an instrument was held void, in Hibblewhite *v.* M'Morine, 6 M. & W 200. "The only case cited," said *Parke*, B, "in favor of the validity of a deed in blank, afterwards filled in, is that of Texira *v.* Evans, (cited in Master *v.* Miller, 1 Anstr. 228,) where Lord *Mansfield* held, that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, 'as it assumes there could be an attorney without deed.' On the other hand, there are several authorities, that an instrument which has a blank in it which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up."

SECTION II.

OF THE OBLIGATIONS OF THE TRANSFERRER BY DELIVERY.

As a general rule, one who transfers paper by delivery only is no longer a party to that paper, and has no interest in it, and incurs none of the liabilities for it which attach to an indorser. The reason for this is twofold. As all paper deliverable by transfer, whether payable to bearer, or to order and indorsed in blank, may be indorsed by the holder, who thereby incurs certain liabilities, it is a reasonable inference, if he transfers it, and it is received without his indorsement, that such liabilities did not enter into the bargain or the intention of the parties. And, moreover, if he gave the paper for goods, it may be understood that he sells the paper and buys the goods, or exchanges the paper for the goods, each party receiving at his own risk what the other party gives.

One exception to this is derived, indeed, from the law of sales, and is analogous to one which belongs to that law: it is that which makes the transferrer of notes or bills by delivery warrant the genuineness of signatures, and that the title is what it purports to be.(*e*) If, therefore, the paper is forged, the transferrer is liable; not, however, on the paper and as a party to it, but on the original consideration, which revives, or rather has never been

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(*e*) Jones *v.* Ryde, 5 Taunt. 488; Bruce *v.* Bruce, 1 Marsh. 165; Gurney *v.* Womersley, 4 Ellis & B. 133, 28 Eng. L. & Eq. 256; Fuller *v.* Smith, Ryan & M. 49; Ellis *v.* Wild, 6 Mass. 321; Young *v.* Adams, 6 Mass. 182; Cabot Bank *v.* Morton, 4 Gray, 156; Markle *v.* Hatfield, 2 Johns. 455; Eagle Bank of New Haven *v.* Smith, 5 Conn. 71; Strange *v.* Ellison, 2 Bailey, 385; Morrison *v.* Currie, 4 Duer, 79; Prettyman *v.* Short, 5 Harring. Del. 360; Thrall *v.* Newell, 19 Vt. 202; Shaver *v.* Ehle, 16 Johns. 201; Herrick *v.* Whitney, 15 Johns. 240; Ramsdale *v.* Horton, 3 Penn. State, 330; Lyons *v.* Miller, 6 Gratt. 427. And see Ketchum *v.* Bank of Commerce, 19 N. Y. 499; Strange *v.* Ellison, 2 Bailey, 385. In Aldrich *v.* Jackson, 5 R. I. 218, *Ames*, C. J., delivering the opinion of the court, said: "It is too well settled at this day to admit of discussion, that the vendor of a bill or note, by the mere act of sale, impliedly warrants the genuineness of the signature of the previous parties to it; although he does not thereby, when he does not indorse or otherwise assure payment of the same, warrant their solvency. If the signatures, or either of them, be forged, what he sells is not what upon its face it purports, and what, therefore, he affirms and thus warrants it to be; and he is liable to the vendee for what he has received from him for it, on the ground of failure of consideration." See also Merriam *v.* Wolcott, 3 Allen, 258.

extinguished.(*f*) And if the transferrer be only an agent, if he does not at the time disclose the name of his principal, and the

(*f*) Fuller *v.* Smith, Ryan & M. 49; Jones *v.* Ryde, 5 Taunt. 488; Bruce *v.* Bruce, 1 Marsh. 165, 5 Taunt. 495; Herrick *v.* Whitney, 15 Johns. 240; Baskins *v.* Wilson, 6 Cowen, 471; Murray *v.* Judah, 6 Cowen, 484; Morrison *v.* Currie, 4 Duer, 79; Young *v.* Adams, 6 Mass. 182; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 33; Mudd *v.* Reeves, 2 Harris & J. 368; Hargrave *v.* Dusenberry, 2 Hawks, 326; Keene *v.* Thompson, 4 Gill & J. 463; Markle *v.* Hatfield, 2 Johns. 455; Shaver *v.* Ehle, 16 Johns. 201; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Thomas *v.* Todd, 6 Hill, 340. "It would be matter of regret," said Chief Justice Kent, in Markle *v.* Hatfield, *supra*, "if the law obliged us to regard a payment in counterfeit instead of genuine bank-bills as a valid payment of a debt, merely because the creditor did not perceive and detect the false bills at the time of payment. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by Paulus, in the Digest (46, 3, 50), and has been incorporated into the French law. He says, that, if a creditor receive by mistake anything in payment different from what was due, and upon the supposition that it was the thing actually due, as if he receive brass instead of gold, the debtor is not discharged, and the creditor, upon offering to return that which he received, may demand that which is due by the contract." In Chalmers *v.* Harris, 22 Texas, 265, the plaintiff recovered the amount he had given in specie in exchange for a counterfeit bank-bill which the defendant had presented to him for the purpose of making change. Where the purchaser of goods agreed to procure and deliver to the vendor, in payment, the note of a third person, indorsed by two others, and afterwards wrote to B. this letter, — "I enclose you the note of W.'s, as proposed, which you will please pass to my credit," — it was held that this was tantamount to a warranty that the indorsements on the note were genuine. Coolidge *v.* Brigham, 1 Met. 547, 5 id. 68. See also Thrall *v.* Newell, 19 Vt. 202. There is a case in Maine which is not in accordance with the rule and the cases given above. It was there held, that one who sells a promissory note by delivery is not liable upon an implied warranty of the genuineness of it, if he sold the same as property, and not in payment of a debt, and if he did not know of the forgery. But it was said, that when an innocent holder of negotiable paper parts with it by delivery, without indorsing it, in payment of a debt due, or then created, as, for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker, or individual, and the paper proves to have been forged, the debt or loan, not being paid by it, may be recovered. In such case there is a warranty implied by law that the paper is genuine, as there is that coin or bank-notes used for like purpose are genuine. Baxter *v.* Duren, 29 Maine, 434. But this distinction does not seem to be well founded. But where bankers paid a forged acceptance of one of their customers, made payable at their house, it was held that they could not recover the money from the *bona fide* holders of the bill, to whom the payment was made, on the principle that it was the duty of the bankers to have ascertained the authenticity of the order before they obeyed it. Smith *v.* Mercer, 6 Taunt. 76. See also Price *v.* Neal, 3 Burr. 1354; Wilkinson *v.* Lutwidge, 1 Stra. 648; Goddard *v.* Merchants' Bank, 2 Sandf. 247, 4 Comst. 147; Canal Bank *v.* Bank of Albany, 1 Hill, 287. There can be no recovery, however, against one who has innocently paid away a counterfeit bill, unless it is returned to him, or notice of its want of value is given him, within a reasonable time after the bill is discovered to be worthless, in order that he may be enabled to trace out and fall back upon the person from whom he received it. Thomas *v.* Todd, 6 Hill, 340; Markle *v.* Hatfield, 2 Johns. 455; Simms *v.* Clark, 11 Ill. 137. But what shall be

bill or note proves to be a forgery, he is personally liable for the consideration received.(*g*)

Most of the cases on this subject relate to the genuineness of the signatures of parties to negotiable paper. It is, however, equally well settled that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be.(*h*) So, also, there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability,(*i*) and the assignment of a bill or note, as of any chose in action, for a valuable consideration, would raise an implied warranty that the assignor has

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considered a reasonable time must necessarily depend upon the situation of the parties and the facts and circumstances of the particular case, and is therefore a question for the jury. Simms *v.* Clark, *supra.*

(*g*) Gurney *v.* Womersley, 4 Ellis & B. 133, 28 Eng. L. & Eq. 257; Morrison *v.* Currie, 4 Duer, 79; Rieman *v.* Fisher, 4 Am. Law Reg. 433. In Gurney *v.* Womersley, *supra,* the defendants were bill-brokers, who received a bill of exchange to be discounted, and took it to the plaintiffs, who were money-lenders, with whom the defendants as bill-brokers had previously had similar dealings; the defendants did not disclose their principal, and were regarded as principals; and it was held by the court, all the judges concurring, that they were liable, and the plaintiffs should recover back the amount paid by them for the forged bill. "The defendants dealt as principals, and were responsible for the genuineness of the bill." Per Lord *Campbell,* C. J. The case of Rieman *v.* Fisher, *supra,* was like the above case in its facts, and was determined in the same way. This case was in the Superior Court of Baltimore City. In Baxter *v.* Duren, 29 Maine, 434, a different view was taken of the liabilities of an agent or broker selling negotiable paper. It was held, that, if the broker made no promise or representation concerning it, he would not be liable to the purchaser upon its proving to be a forgery, though not disclosing his agency; for any one dealing with him should be presumed to know, from the nature of a broker's business, that he was acting as agent for some third person. But see Merriam *v.* Wolcott, 3 Allen, 258.

(*h*) Where, therefore, an unstamped bill of exchange, purporting to be a foreign bill drawn at Sierra Leone, but which had been really drawn in London, was sold, and refused payment by the acceptor, it was held that the vendee was entitled to recover back the price of the bill. Gompertz *v.* Bartlett, 2 Ellis & B. 849, 24 Eng. L. & Eq. 156. See also Young *v.* Cole, 3 Bing. N. C. 724.

(*i*) Lobdell *v.* Baker, 1 Met. 193, 3 Met. 469. In this case, the plaintiff had purchased a negotiable note in the market, though not of the defendant, which note had been indorsed by a minor, and the action was against the defendant for deceit in procuring the minor to indorse the note, and then putting it into circulation. No representation by the defendant that the indorsement was valid was shown, or any actual intention to defraud proved; but the court held, that the disposing of the note for a valuable consideration was by necessary implication an affirmance that the indorser was a person capable of indorsing, and of binding himself by such indorsement; and upon the ground of such implied affirmation, connected with his knowledge of the minority of the indorser, the defendant was held liable. See also Thrall *v.* Newell, 19 Vt. 202.

done nothing and will do nothing to prevent the assignee from collecting it.(*j*) The reason for the general rule above stated is, that forged paper is simply nothing, and one who has transferred it for a consideration has transferred nothing, and is therefore liable on the consideration.

This rule is universally admitted; but when the question arises, whether the notes of insolvent banks are to be put in the same category as forged notes, and to be considered, therefore, as nothing at all, and as extinguishing no claim, we find much conflict and uncertainty. In our chapter on Bank-notes, it will be seen that a large proportion of this is due, not so much to the uncertainty of the law as to the difficulty of determining the facts in each case in relation to the time or the evidence of the insolvency, or the times and circumstances of the bargain; and the further difficulty of separating the law from the fact.(*k*) There is some reason for putting the bills of a bank which cannot pay them on the same footing with those which the bank never made; and for holding that he who delivers bills of a bank actually insolvent is not harmed by having them returned on his hands, if in the mean time they have lost no value except that which is derived from an entire ignorance of their real worth, or rather worthlessness. It may be supposed, in the absence of any evidence of a bargain on the subject between the parties, that the transferee takes the bill only on condition that he will collect them if he can; but if he cannot, with proper diligence, they shall remain at the risk of the transferrer, and the receiver is then only bound to state to the giver their want of value, and offer to return them in season to save all his rights; and perhaps the weight of authority is in favor of this view; but the decisions on this subject cannot be reconciled.(*l*)

The same principles apply in respect to bills of exchange, notes, and checks of third persons, taken on account of an antecedent debt, without indorsement.(*m*) But if there is an express or implied agreement by the creditor to take the paper

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(*j*) Eaton *v.* Mellus, 7 Gray, 566.

(*k*) See *post*, chapter on Bank-Notes.

(*l*) See *post*, chapter on Bank-Notes.

(*m*) See Noel *v.* Murray, 3 Kern. 167; People *v.* Howell, 4 Johns 296. In such case the *onus* of showing that the paper was taken as payment by the creditor is upon the debtor.

for the amount of his debt as an absolute payment, this of course destroys the right of action for the original debt; (*n*) and if the paper is discounted without indorsement, and without any antecedent debt, this seems to be evidence of a purchase, and there can be no recovery on the consideration paid.(*o*)

So when a bill or note is exchanged without indorsement for merchandise, it is held that there is no implied warranty of the solvency of the parties to it.(*p*) In all cases where the assignor of a bill or note knows it to be of no value, and the assignee receives it in good faith, paying a valuable consideration of any kind, the assignor may be compelled to repay or return the consideration thus received.(*q*)

(*n*) Ex parte Blackburne, 10 Ves. 204; Brown *v.* Kewley, 2 Bos. & P. 518; Camidge *v.* Allenby, 6 B. & C. 373; Owenson *v.* Morse, 7 T. R. 64; Ex parte Shuttleworth, 3 Ves. 368; Emly *v.* Lye, 15 East, 7, 13.

(*o*) Emly *v.* Lye, 15 East, 7, 13; Fenn *v.* Harrison, 3 T. R. 779; Ex parte Shuttleworth, 3 Ves. 368; Fydell *v.* Clark, 1 Esp. 447; Ex parte Blackburne, 10 Ves. 204.

(*p*) Burgess *v.* Chapin, 5 R. I. 225; Beckwith *v.* Farnum, 5 R. I. 230; Bicknall *v.* Waterman, 5 R. I. 43. These three cases arose out of the barter of cotton for the notes of third persons without indorsement. In the last case, *Ames*, C. J., delivering the opinion of the court, said: "The well-known common-law principle, applicable alike to sales and exchanges of personal things, is, that fraud or warranty is necessary to render the vendor or exchanger liable, in any form, for a defect in the quality of the thing sold or exchanged Applying this principle to the sale or exchange of the note of a third person, transferred by indorsement without recourse or by delivery merely, the vendee or person taking it in exchange takes the risk of the past or future insolvency of the maker or other party to it; unless, indeed, in case of past insolvency, the vendor or exchanger is guilty of the fraud of passing it off with knowledge of that fact." See also the remarks of the same learned judge in Burgess *v.* Chapin, *supra*. See Ellis *v* Wild, 6 Mass. 321; Roget *v* Merritt, 2 Caines, 117; Whitbeck *v.* Van Ness, 11 Johns. 409; Waydell *v.* Luer, 3 Denio, 410; Camidge *v.* Allenby, 6 B. & C. 373; Emly *v.* Lye, 15 East, 7, 12; Noel *v.* Murray, 3 Kern. 167; Clerk *v.* Mundall, 12 Mod. 203; Tassell *v.* Lewis, 1 Ld. Raym. 743; Fenn *v.* Harrison, 3 T. R. 759; Evans *v.* Whyle, 5 Bing. 485. But where a purchaser of goods transfers to the seller a note of a third person, and, with a view to add his own responsibility, indorses a guaranty, which, however, is void for not expressing the consideration, the guaranty is evidence that the note was not taken in payment, and the seller may recover for the goods. Monroe *v.* Hoff, 5 Denio, 360.

(*q*) Anon., 12 Mod. 517; Fenn *v.* Harrison, 3 T. R. 759; Popley *v.* Ashly, 6 Mod. 147, Holt, 121; Camidge *v.* Allenby, 6 B. & C. 373, 9 Dowl. & R. 391.

SECTION III.

OF THE RIGHTS OF THE TRANSFEREE BY DELIVERY.

We have seen that it is now well settled, that one who takes negotiable paper, transferable by delivery, acquires an absolute property in it, and may recover upon it, although the paper was fraudulently put in circulation, or had been stolen, provided he takes it in good faith for a valuable consideration, even though guilty of gross negligence in doing so. The burden of proving good faith may be on the plaintiff, but this is *prima facie* implied by possession; and to meet the inference so raised, fraud, felony, or some such matter, must be proved.(*r*)

A transferee by delivery receives the paper also as free from all equitable defences as a transferee by indorsement. But there must be an actual transfer, made in good faith, to shut out these defences. If, therefore, one present such paper merely as agent of another who is the actual owner, and the payee has a good defence against that owner, he may make it against the agent; and this even in the case where the owner owes his agent more than the amount of the paper.(*s*)

This rule would apply undoubtedly where the paper was indorsed to the agent to give him authority to collect; but not where the paper had been assigned in payment or as security for the debt to the agent, because he would then collect it as his own. This distinction depends upon that between an authority coupled with an interest and a bare authority. And here, undoubtedly, the further distinction, best illustrated by Chief Justice Marshall,(*sa*) should be applied. That is, if the agent were only authorized to collect the proceeds for the principal, and then to apply the proceeds to the payment of a debt due to himself, this would not give him an interest in the paper itself. It would be much the same as if he were bound to apply the proceeds to the payment of some other debt due from the principal;

(*r*) These questions are very fully considered in the chapter on a Lost Note or Bill. See also *supra*, Vol. I. p. 258.

(*s*) See Solomons *v.* Bank of England, 13 East, 135, note; Lowndes *v.* Anderson, 1 Rose, 99.

(*sa*) Hunt *v.* Rousmanier, 8 Wheat. 174, 201.

nor can he have the rights of principal instead of agent, unless there has been an actual assignment of the paper to him.

If such a note be pledged only, the pledgee holds it as free from all such defences as if it were absolutely transferred to him. The peculiar quality and exemptions of negotiable paper go with them when pledged. And although the pledge was given with such absence or infirmity of title of the pledgor, that, had it been a pledge of chattels, the true owner might have maintained trover for them against the pledgee, he cannot do this, nor demand the paper or its proceeds in any way from the pledgee, provided it was received in good faith, and the pledgee had the possession in fact, and the note was transferable by delivery.(*t*)

It may be remarked, in this connection, that, as no one can say to a holder for value of negotiable paper which the transferrer had sent with his credit into circulation, or exposed to being so used, that he had in fact a private bargain with his transferee, or private rights over the paper, it follows that a holder of such paper, whether as pledgee or not, may sell, or discount, or pledge it, or otherwise dispose of it.(*u*)

(*t*) Collins *v.* Martin, 1 Bos. & P. 648. This was an action of trover for two bills of exchange indorsed in blank and deposited by the plaintiff with his bankers for collection, and by them pledged for their own debts to the defendant. Held, that the action could not be maintained. This decision was cited and approved of in Treuttel *v.* Barandon, 8 Taunt. 100, and Wookey *v.* Pole, 4 B. & Ald. 1. See also Bolton *v.* Puller, 1 Bos. & P. 539, 546; Ex parte Pease, 1 Rose, 232; Thompson *v.* Giles, 2 B. & C. 422. If a party authorized by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, misapplies any of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. Palmer *v.* Jarmain, 2 M. & W. 282; Stierneld *v.* Holden, 4 B. & C. 5, Ryan & M. 219. And see Sigourney *v.* Lloyd, 8 B. & C. 622, 5 Bing. 525. If the transferee has notice that the paper was wrongfully pledged to him, he will be liable in trover to the true owner; as where a bill was indorsed by the payee in this form: "Pay A. B., or order, for the account of C. D.," and A. B. pledged it with the defendant, who advanced money upon it to A. B. personally; it was held, that the defendant had sufficient notice that it was transferred to him without authority, and was liable in trover to C. D. Treuttel *v.* Barandon, 8 Taunt. 100, 1 J. B. Moore, 543.

(*u*) Bolton *v.* Puller, 1 Bos. & P. 539; Collins *v.* Martin, id. 648, 2 Esp. 520; Jarvis *v.* Rogers, 13 Mass. 105, 15 id. 389; Appleton *v.* Donaldson, 3 Barr, 381; Palmer *v.* Richards, Exch. 1851, 1 Eng. L. & Eq. 529; Poirier *v.* Morris, 2 Ellis & B. 89, 20 Eng. L. & Eq. 103; Atkinson *v.* Brooks, 26 Vt. 569; Ramsbotham *v.* Cator, 1 Stark. 228; Clement *v.* Leverett, 12 N. H. 317; Brush *v.* Scribner, 11 Conn. 388; Sweetser *v.* French, 2 Cush. 309; Bay *v.* Coddington, 5 Johns. Ch. 54; Coddington *v.* Bay, 20 Johns. 637; Stalker *v.* M'Donald, 6 Hill, 93; Swift *v.* Tyson, 16 Pet. 1; Boggs *v.* Lancaster Bank, 7 Watts & S. 331.

He must account for it to the pledgor when duly called on, but his disposition of it in the mean time can work no harm to the owner beyond that for which the owner is responsible, and therefore gives him no action. And any party to whom he transfers it, by indorsement or by delivery, according as the paper may be transferable, acquires a full right to it.(*v*)

If it has been pledged, however, by any party, in fraud of the owner, to a *bona fide* pledgee, as the pledgee has only a lien for the amount of his debt, the true owner, by paying the debt and discharging that lien, may repossess himself of the paper. And in such case, if the pledgee sue the parties liable upon the note, he can recover only to the amount for which he took the note as collateral security.(*w*)

It is, under some points of view, an important question whether such paper has been transferred for a new or an old consideration, or in payment of a new purchase or for a former debt; in full payment of, or only as security for, an antecedent debt. But these questions have been already considered.(*x*)

SECTION IV.

OF TRANSFER BY ASSIGNMENT.

BILLS and notes which are not payable either to bearer or to order cannot be transferred, either by indorsement or by deliv-

(*v*) Lowndes *v.* Anderson, 13 East, 130; Jacks *v.* Darrin, 3 E. D. Smith, 557; Palmer *v.* Richards, Exch. 1851, 1 Eng. L. & Eq. 529; Marston *v.* Allen, 8 M. & W. 494.

(*w*) Stoddard *v.* Kimball, 6 Cush. 469; Chicopee Bank *v.* Chapin, 8 Met. 40. In this case, an action was brought against the first indorser of a note, by a holder to whom it was pledged by the second indorser, as collateral security for a debt. The defendant offered to show that he indorsed the note for the accommodation of the maker, and intrusted it to him for a special purpose, and that the maker without any consideration transferred it to the second indorser, who had knowledge of these facts, though the pledgees had not; and it was held that they could recover only the amount secured by the pledge. *Shaw*, C. J. said: "So far as they would recover beyond that, they would recover to the use of the indorser. But if the facts were proved, which the evidence that was offered tended to prove, they could not recover for his use, because it would show that he was not a *bona fide* holder. Such a division of the damages recoverable by an indorsee is well warranted, we think, on principle and on the authorities," citing Jones *v.* Hibbert, 2 Stark. 304; Wiffen *v.* Roberts, 1 Esp. 261; Parish *v.* Stone, 14 Pick. 198. See also Hilton *v.* Smith, 5 Gray, 400; Bond *v.* Fitzpatrick, 4 Gray, 89.

(*x*) See *supra*, Vol. I. pp. 218 - 228.

ery, so as to substitute the transferee for the transferrer, and enable the former to sue in his own name.(*y*) But all debts are choses in action; and bills and notes, which are, strictly speaking, only evidences of indebtedness, are themselves called and treated as choses in action; and now all choses in action may be assigned.

The very meaning of chose in action is "a thing which lies in action," or which cannot be reduced into possession without an action at law. Anciently it was held that a transfer of this was only a transfer of a right to go to law, and such was the dislike of the old law to litigation, that the transfer was prohibited and void.(*z*)

Courts of equity long since disregarded this rule, and now, if an assignee of a chose in action acquires any equitable right which the court will enforce, he may generally proceed in his own name.(*a*) It is not so in courts of law. There the

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(*y*) Hill *v.* Lewis, 1 Salk. 132; Tassell *v.* Lewis, 1 Ld. Raym. 743; White *v.* Heylman, 34 Penn. State, 142; Backus *v.* Danforth, 10 Conn. 297; Parker *v.* Riddle, 11 Ohio, 102; Bush *v.* Peckard, 3 Harring. Del. 385; Whiteman *v.* Childress, 6 Humph. 303; Barriere *v.* Nairac, 2 Dallas, 249; Noland *v.* Ringgold, 3 Harris & J. 216; Matlack *v.* Hendrickson, 1 Green, 263; Pratt *v.* Thomas, 2 Hill, S. Car. 655; Fernon *v.* Farmer, 1 Harring. Del. 32.

(*z*) Scholey *v.* Daniel, 2 Bos. & P. 540; Patridge *v.* Strange, Plowd. 77, 88; Perry *v.* Jones, 1 H. Bl. 30. "No possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits." Per Lord *Coke*. Sampet's case, 10 R. 48. And again, in his commentaries on Littleton, he says that it is one of the maxims of the common law, that no right of action can be transferred, because, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth." Co. Litt. 214, *a*. In Bacon's Abridgment, Tit. Obligation, A, it is stated that "a bond is a chose in action which cannot be assigned over so as to enable the assignee to sue in his own name; yet he has by the assignment such a title to the paper and wax that he may keep or cancel it." But as the reason of the rule above stated is inapplicable to the sovereign or government, who can never be presumed to do any injustice to the subjects, or oppress them in any manner, an assignment of a chose in action could be made by or to the sovereign or government, in the same way as if the instrument had been originally assignable, though no such power was conferred upon the assignee of the government. Co. Litt. 232, *b*, note 1; The King *v.* Wendman, Cro. Jac. 82; The King *v.* Twine, Cro. Jac. 179; Kingdom *v.* Jones, Skin. 6, 26; Lambert *v.* Taylor, 4 B. & C. 138, 150; Prosser *v.* Edmonds, 1 Younge & C., Exch. 481, 499; Miles *v.* Williams, 1 P. Wms. 249; U. S. *v.* Buford, 3 Pet. 12; U. S. *v.* White, 2 Hill, 59.

(*a*) Wright *v.* Wright, 1 Ves. Sen. 411; Baldwin *v.* Rochford, 1 Wilson, 229; Peters *v.* Soame, 2 Vern. 428; Coles *v.* Jones, 2 Vern. 692; Carteret *v.* Paschal. 3 P. Wms. 197; Hammond *v.* Messenger, 9 Sim. 327; Ross *v.* Smith, 19 Texas, 171, per *Hemphill*, C. J. It is said that the only authority to be found where a court of equity has re-

ancient rule is, and for a long time has been, so far relaxed that he may proceed in the name of his assignor, or of the executor or administrator of the assignor, if he be dead ; (*b*) but then, as he stands in the place and upon the rights of the assignee, he is subject to whatever defences might be made against the assignor, provided they are such as the law considers equitable.

On this point the principal rule is, that they must be equities subsisting at the time the debtor receives notice of the assignment.(*c*) And the obvious reason is, that the debtor has no right to create new defences after such notice.

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fused to give effect to an assignment for a sufficient consideration of a chose in action is a case decided in the 11 James I., 1 Rol. Abr. 376, 1. *b*.

(*b*) Amherst Academy *v.* Cowls, 6 Pick. 427 ; Skinner *v.* Somes, 14 Mass. 107 ; Gordon *v.* Drury, 20 N. H. 353 ; Day *v.* Whitney, 1 Pick. 503. "The doctrine of equitable assignments," said *Dewey*, J., in Gibson *v.* Cooke, 20 Pick. 15, "has been gradually extending to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle, that in such cases the assignee can enforce his claim only in the name of the assignor, unless there be an express promise by the debtor to pay the assignee."

(*c*) Thompson *v.* Emery, 7 Foster, 269 ; White *v.* Heylman, 34 Penn. State, 142 ; Warner *v.* Whittaker, 6 Mich. 133 ; Murray *v.* Lylburn, 2 Johns. Ch. 441 ; Cornish *v.* Bryan, 2 Stockt. Ch. 146 ; Goodrich *v.* Stanley, 23 Conn. 79 ; Freeman *v.* Perry, 22 Conn. 617 ; Hedges *v.* Sealy, 9 Barb. 214 ; Lithgow *v.* Evans, 8 Greenl. 330 ; Guerry *v.* Perryman, 6 Ga. 119 ; Wood *v.* Perry, 1 Barb. 114 ; Maybin *v.* Kirby, 4 Rich. Eq. 105 ; Duncklee *v.* Greenfield Steam-Mill Co., 3 Foster, 245. In order to protect the assignee of a bill or note from the effect of any subsequent payment by the debtor to the assignor, it is sufficient if he give the debtor notice of the assignment without exhibiting the security, or offering him any other evidence of the fact. Davenport *v.* Woodbridge, 8 Greenl. 17. He may require such evidence of the assignment, say the court, before payment to the assignee, but the notice he receives is only a measure of precaution, and to put him upon inquiry. If he finds the original creditor still retaining the evidence of the demand, he may be well justified in paying it to him, but if he cannot produce it, he has the best reason to believe the notice has truly stated the fact of the assignment. After notice, the debtor acts at his peril, and the assignee, conducting fairly on his part, is not to be deprived of his equitable interest. See also Anderson *v.* Van Alen, 12 Johns. 343 ; King *v.* Fowler, 16 Mass. 397 ; Ammidown *v.* Wheelock, 8 Pick. 470 ; Kellogg *v.* Krauser, 14 S. & R. 137. Where the holder of a due-bill assigned it by indorsement in blank, and the assignee demanded payment, but did not show the due-bill, nor expressly state that it had been assigned, and the debtor promised to settle it the next week in New York, but afterwards paid it in New York to the assignor, it was held that the assignee could not maintain an action in the assignor's name. Meghan *v.* Mills, 9 Johns. 64. A second assignee, who gives immediate notice of his assignment, and attends to the prosecution of his claim, has a better title than a prior assignee of whom he had no knowledge, and who gave no notice of his assignment, and took no step to enforce his claim until after an award had been made in favor of the second. Judson *v.* Corcoran, 17 How. 612. Or if the prior assignee be guilty of any neglect or fraud which enables the assignor to make a second assignment to a *bona fide* assignee,

For example, A owes B one thousand dollars, to be paid in one year; he gives him a note not payable to order, or some other recognition and promise, or nothing whatever, for this is material only as matter of evidence. B for value assigns the debt or note to C, after half of the year has expired, and C gives immediate notice to A. At the end of the year C calls on A, who says that during the first six months he had let B have divers goods or sums of money on account of this note, and this he must now offset, for all B could transfer was the same right he had himself when he made the transfer. To this C must assent; but he may also insist that any further goods or sums which A let B have after the assignment and notice shall not be offset, because the assignment and notice had the effect of changing the debt from A to B into a debt from A to C; and if A now let B have anything on account of this debt, it was done in fraud of C, or, at all events, founds no claim against him.

So also where the assignee sues in the name of the assignor, the defendant may set off a debt due from the assignee to him, in like manner as if the suit had been brought in his own name.(*d*)

The common-law rule, that the assignee of non-negotiable paper, and of paper payable to order, and assigned without indorsement, must proceed in an action thereon in the name of the assignor, has recently been changed by statute in several of the States, so as to enable him to sue in his own name; but in such case it is provided that the action shall be without prejudice to any defence or set-off the defendant may have had against the same previous to notice of the assignment.(*e*)

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the latter will be preferred to the first. Maybin *v.* Kirby, 4 Rich. Eq. 105. In Jones *v.* Witter, 13 Mass. 304, Mr. Chief Justice *Parker* said: "The contract between assignor and assignee is operative between them only until some act takes place which brings the maker of the note into the contract. This act is notice to him; and after such notice it becomes entirely immaterial to him which shall be his creditor, as all payments, or lawful offsets existing before such notice, will be allowed him; and all subsequent payments may as well, for his interest, be made to the assignee as to the original creditor."

(*d*) Corser *v.* Craig, 1 Wash. C. C. 424.

(*e*) In New York, Ohio, Wisconsin, Minnesota, and California, it is provided that every action shall be brought in the name of the real party in interest. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this latter clause does not apply to a negotiable promissory note, or bill of

There is also a provision in several States that notes made payable to the maker thereof, or to the order of a fictitious person,

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exchange transferred in good faith, and upon good consideration, before due. R. S. of N. Y., Vol. II. p. 499; R. S. of Ohio, 1854, c. 87, §§ 25, 26; R. S. of Wisc. 1858, c. 122, § 13; Stats. of Minn., compiled 1859; Wood's Dig. 1858, p. 72. See also the Civil Code of Kentucky, adopted March, 1851, § 58, in last edition § 31, and Kelly *v.* Smith, 1 Met. Ky. 313. Under the above statutes it is held that a person to whom a promissory note, payable to order, has been sold and delivered, previous to its becoming due, for a full and valuable consideration, may maintain an action thereon, in his own name, without alleging an indorsement of the note to him. Billings *v.* Jane, 11 Barb. 620.

In Alabama, it is provided that "every action founded upon a promissory note, bond, or other contract, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he have the legal title or not, subject to any defence the payer, obligor, or debtor may have had against the payee, obligee, or creditor previous to notice of the assignment or transfer; but this clause does not apply to bills of exchange, or instruments payable in bank or at a private banking-house; in all other cases the suit must be instituted in the name of the person having the legal title." Code 1852, § 2129.

In Arkansas, it is provided that all bonds, bills, and notes may be sued in the name of the assignee, subject to the defences or offsets, either in law or equity, that any defendant may have against the original assignor, previous to the assignment, or against the plaintiff or assignee after the assignment. The assignee of every such instrument is not required to prove the assignment, unless the defendant shall annex to his plea an affidavit denying such assignment, and stating that he believes it was forged. Dig. of Statutes, 1858, c. 15, §§ 1 – 4, p. 157. But under this statute it is held that, to authorize an assignee to sue in his own name, the bill or note must be indorsed, and delivery alone is not sufficient. Bradley *v.* Trammel, Hempst. C. C. 161; Hardie *v.* Mills, 20 Ark. 153.

In California, there is the further special provision that "all bonds, due-bills, notes, or other instruments in writing not negotiable may be assigned, by indorsement, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in the assignee, who may maintain an action thereon in his own name, subject to any defence which the maker or obligor might have set up to the action of the payee or obligee, where the same has arisen previous to notice of the assignment." Wood's Dig. 1858, p. 75, Arts. 198, 199.

In Florida, it is provided that the assignee or indorsee of any bond, note, or bill of exchange may bring suit thereon in his own name, with the same rights and powers as might have been possessed by the assignor or indorser. Thomson's Dig. 1847, p. 348.

In Indiana, actions must be prosecuted in the name of the real party in interest. "When any action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant to answer as to the assignment, or his interest in the subject of the action. And all actions by assignees shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment, except actions on negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due." 2 R. S. 1852, pp. 27, 28, §§ 3, 6.

In Iowa, actions are to be brought in the names of the real parties in interest, and it is provided specially that notes payable to order or to bearer may be sued in the name of the person to whom they are indorsed or delivered, and that bonds, due-bills, and

shall, if negotiated by the maker, have the same effect, as against him and all persons having knowledge of the facts, as if payable

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other promises in writing to pay, without words of negotiability, are assignable by indorsement or by other writing, and the assignee may sue thereon in his own name, subject to any defence or set-off, legal or equitable, which the maker or debtor had against any assignor thereof before notice of his assignment. Code 1851, c. 58, §§ 948, 949, and c. 100, § 1676.

In Maryland, the assignee of any chose in action for the payment of money, entitled thereto by assignment in writing, may maintain an action thereon in his own name; but the defendant may make the same legal or equitable defence as might have been had against the assignor at the time of such assignment, and before notice thereof. Code 1860, Vol. I. p. 43.

In Michigan, it is provided that "the assignee for a valuable consideration of any bond, note, or other chose in action, which has been or hereafter may be assigned, if the assignor be dead, and there be no executor or administrator appointed upon his estate, or if such executor or administrator have no interest in the thing assigned, or shall refuse to prosecute for the same, may sue and recover in his own name upon such bond, note, or other chose in action, and the defendant in all such suits, until due notice of such assignment shall have been given, may set up and avail himself of any defence he may have in such action, in the same manner and with the like effect as if the assignor had been living, and the action had been prosecuted in his name." Comp. Laws, 1857, Vol. II. p. 1147, § 4159.

In Mississippi, all bonds, obligations, bills single, and promissory notes may be assigned by indorsement, whether the same be payable to order or assigns or not; and the assignee or indorsee may maintain an action thereon in his own name, subject to the defence and set-offs which the defendant had against the same previous to notice of assignment, in the same manner as though the suit had been brought by the obligee or payee. R. Code 1857, c. 43, § 2, p. 355.

In Missouri, it is provided that actions shall be prosecuted in the name of the real party in interest. 2 R. S. 1855, p. 1217, c. 128, Art. 2, § 1. Under this statute it was held, in Boeka *v.* Nuella, 28 Misso. 180, that a promissory note may be transferred by delivery, without indorsement or written assignment, so as to enable the assignee to maintain an action thereon in his own name. It seems, however, that a note transferred in that way will be subject to every defence which the maker had against it at the time of or before notice of the transfer. And so it was held of a note non-negotiable, in Bennett *v.* Pound, 28 Misso. 598. And again, in Lewis *v.* Bowen, 29 Misso. 202, it was held that no indorsement or written assignment of a note is necessary to enable the holder to maintain an action in his own name. A deed of assignment for the benefit of creditors, purporting to assign a negotiable promissory note, is sufficient to enable the assignee to maintain an action upon it in his own name. McClain *v.* Weidemayer, 25 Misso. 364. Such, also, is the effect of an assignment written on an envelope of the "within notes." Thornton *v.* Crowther, 24 Misso. 164.

In Texas, it is provided that the assignee of bonds, and other instruments not negotiable, may maintain an action thereon in his own name, subject to any defence against the same which it would have been subject to in the hands of any previous owner before notice of the assignment. Oldham & White's Dig. 1859, p. 51, Art. 88. Though the holder of an instrument not negotiable may maintain a suit upon it in his own name, he must show his right to the paper, either by an indorsement or proof of ownership; and when he has taken it by delivery simply, his possession of it does not create such a presumption of ownership as to dispense with proof of that fact. Mer-

to the bearer.(*f*) And, independent of any statutes, if a note is made payable to a fictitious person or order, and is indorsed in the name of such person, it will be deemed, as to all *bona fide* holders without notice of the fiction, a note payable to bearer,(*g*) though it would be otherwise if they had notice of the fiction when they received it.(*h*) We have already given some consideration to this subject in the chapter referred to in our note.

The law goes yet further; and by a principle derived from the civil law, and there known as *novation*, permits the assignee to sue the debtor in his own name, provided the assignor has discharged the debtor, and the debtor, in consideration thereof and of the assignment, has promised the assignee to pay the debt to him.(*i*)

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lin *v.* Manning, 2 Texas, 351; Merrill *v.* Smith, 22 Texas, 53. And so it is held that the possession of a promissory note, payable to another or order, and not indorsed in blank by the payee, does not constitute such evidence of ownership as will enable the person in possession to sustain an action on the note upon allegation that it was transferred to the plaintiff by delivery. Ross *v.* Smith, 19 Texas, 171.

In Virginia, the assignee of any bond, note, or writing not negotiable, may maintain thereon any action in his own name which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor before notice of the assignment. Code 1849, c. 144, § 14, p. 147. This act does not apply to negotiable paper, though transferred after due. Davis *v.* Miller, 14 Gratt. 1.

(*f*) New York, 2 R. S. 4th ed., p. 178, § 5; Wisconsin, R. S. 1858, c. 60, § 4; Michigan, 1 Compiled Laws, 1857, p. 407; Missouri, 1 R. S. 1855, p. 297; California, Wood's Dig. 1858, p. 72; Oregon, Stats. 1855, p. 531. The transfer of a note payable to the order of a fictitious person by the holder should be made by delivery only, or by his own indorsement, and not by indorsing the name of the fictitious payee. The holder, without the indorsement of the payee, in order to recover thereon, must prove affirmatively that the payee is a fictitious person, and the maker is not liable to one claiming as indorsee, unless proved to have had knowledge of the fact that the payee was fictitious at the time of the signing. Maniort *v.* Roberts, 4 E. D. Smith, 83. The clause respecting notes payable to the order of the maker has reference only to cases of negotiating without indorsement; nor is it applicable to a case where a third person is named as payee along with the maker. Plets *v.* Johnson, 3 Hill, 112.

(*g*) Plets *v.* Johnson, 3 Hill, 112; Kimmey *v.* Campbell, 1 Ala. 92; Vere *v.* Lewis, 3 T. R. 182; Tatlock *v.* Harris, id. 174; Minet *v.* Gibson, id. 481; Collis *v.* Emett, 1 H. Bl. 313; Ex parte Royal Bank of Scotland, 19 Ves. 310. And so, also, a check payable to a fictitious person is the same as if payable to bearer. Willets *v.* Phœnix Bank, 2 Duer, 121.

(*h*) Bennett *v.* Farnell, 1 Camp. 130; Hunter *v.* Jeffery, Peake, Add. Cas. 146; Cooper *v.* Meyer, 10 B. & C. 468. See *supra*, Vol. I. ch. 3, p. 32, note *i*.

(*i*) Currier *v.* Hodgdon, 3 N. H. 82; Wiggin *v.* Damrell, 4 id. 69; Myers *v.* York & Cumberland R. Co., 43 Maine, 232; Barrett *v.* Union M. F. Ins. Co., 7 Cush. 175; Mowry *v.* Todd, 12 Mass. 281; Ford *v.* Adams, 2 Barb. 349; Lang *v.* Fiske, 11 Maine, 385; Weston *v.* Barker, 12 Johns. 276; Doty *v.* Wilson, 14 id. 378; Thompson *v.*

This is an unquestionable rule when what may be called open debts are assigned; perhaps where notes not negotiable are assigned, it might be difficult to frame a declaration on the note itself, if the assignee were plaintiff; but if other circumstances permitted, he might, by the law of novation, bring his action in assumpsit, and use the note as evidence.

After the debtor has made such promise to pay the assignee, he cannot avail himself, in set-off, of claims he may have had before and at the time of the assignment against the assignor, if he did not reserve them in his promise to the assignee, because such promise, without such reservation, amounts to a waiver of any set-off he might have.(*j*)

It may be well to remark, that the equities of defence which may be relied upon need not have existed at the inception of the debt or contract, but they must have existed before notice of the assignment.(*k*)

After notice of the assignment, a court will prevent the assignor from fraudulently releasing the debtor, or otherwise interfering to defeat the rights of the assignee.(*l*)

But if the assignee of a negotiable note sue the maker, the defendant may set off a negotiable note of the assignor which he held at the time of receiving the notice of the assignment of his own note, although the note thus set off did not become due before the note assigned was sued.(*m*)

Emery, 7 Foster, 269; Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. 337; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 id. 350. A leading English case on this subject is Tatlock *v.* Harris, 3 T. R. 174. A bill of exchange was drawn by the defendant and others on the defendant alone, in favor of a fictitious person, (which was known to all parties concerned in drawing the bill,) and the defendant received the value of it from the second indorser, it was held that a *bona fide* holder for valuable consideration might recover the amount of it in an action against the acceptor for money paid, or money had and received; and *Buller*, J. puts this case: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A." To make an effectual novation, enabling the assignee to sue in his own name, there must be an extinguishment of the old debt and the substitution of a new one between the debtor and the third party.

(*j*) Wiggin *v.* Damrell, 4 N. H. 69; Thompson *v.* Emery, 7 Foster, 269.

(*k*) Warner *v.* Whittaker, 6 Mich. 133.

(*l*) Legh *v.* Legh, 1 Bos. & P. 447; Alner *v.* George, 1 Camp. 392; Parker *v.* Grout, cited in Brown *v.* Maine Bank, 11 Mass. 157, note 1; Wheeler *v.* Wheeler, 9 Cowen, 34.

(*m*) Stewart *v.* Anderson, 6 Cranch, 203.

A note of hand or a bill of exchange, being, as we have said, *itself* only a personal chattel, although called and regarded for most purposes as a chose in action, may be assigned by delivery only, without any writing upon it, or on another paper. And so indeed may any open debt, the transfer being for value, and properly witnessed.

No possession can be delivered of an open debt; but in the case of a note, as possession can be delivered, it should be, and we know no reason why it should not come under the general rules respecting transfer of possession which belong to the law of sales. Formerly, a sale or transfer of a personal chattel, without a transfer of possession, was void; because the retaining of possession by the vendor was considered not only as a badge of fraud, but as conclusive proof of it. Courts of high authority have held the same doctrine in this country. And indeed, to a very recent period, such has been the tendency, if not the positive determination, of some of our State courts. The prevailing rule of the country is otherwise. It may now be considered established, that a retaining possession by the vendor is a circumstance of suspicion, which is, however, more or less open to explanation. In some States, if the possession is retained for any considerable time, and especially if any third parties act on the presumption of property arising from possession, fraud is conclusively presumed. In others, the possession, and the inference from it, may be regarded as always open to rebutter and explanation, and as not avoiding a sale, if that be shown to have been made in good faith.(*n*)

All notes and bills, whether negotiable or not, may be transferred by assignment. But no assignment of a note transferable by indorsement would permit the transferee to sue in his own name.(*o*) And the same rule applies to a bill or note payable on its face to the order of the drawer or maker; for the mere

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(*n*) See the cases collected on this point in 1 Parsons's Contracts, 442; Smith's Lead. Cas., 4th Am. ed., Vol. I. p. 1, *et seq.*

(*o*) Pease *v.* Hirst, 10 B. & C. 122, 5 Man. & R. 88; Thompson *v.* Emery, 7 Foster, 269; State of Arkansas *v.* Bank of Washington, 18 Ark. 554; Grand Gulf Bank *v.* Wood, 12 Smedes & M. 482; Amherst Academy *v.* Cowls, 6 Pick. 427; Matlack *v.* Hendrickson, 1 Green, N. J. 263; Barriere *v.* Nairac, 2 Dallas, 249; Noland *v.* Ringgold, 3 Harris & J. 216; Pratt *v.* Thomas, 2 Hill, S. Car. 655; Wheeler *v.* Wheeler, 9 Cowen, 34.

delivery of such a bill or note, without indorsement, gives the transferee no right of action in his own name.(*p*) But in most other respects we should say that delivery alone of a negotiable note, which could be indorsed, might still operate as an assignment.(*q*)

It is a common method of assigning notes to write the assignment on the back; and there can be no objection to this. Such writing would, literally speaking, be an indorsement; but if the note were not negotiable, it would have the same force, and no more, as if it were an instrument written on other paper.(*r*) If the note were negotiable, it might be a question whether the transferee might not treat it as an indorsement and sue in his own name, although we should be inclined to hold, that the payee might not only limit his indorsement as he chose,

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(*p*) Smalley *v.* Wight, 44 Maine, 442; Titcomb *v.* Thomas, 5 Greenl. 282.

(*q*) Jones *v.* Witter, 13 Mass. 304. In this case, a negotiable promissory note was held to be assigned, by delivery only without writing, for an adequate consideration; and the assignee might recover thereon in the name of the payee, notwithstanding payments made by the maker to the payee after notice of the assignment. And so a bond may be assigned by delivery only. Vose *v.* Handy, 2 Greenl. 322. *Mellen*, C. J., giving the opinion in this case, said: "That for many years courts of justice had been gradually becoming more and more inclined to protect equitable interests; that less form is necessary now than formerly, as to the mode of creating such interests; that the object has been to ascertain that it was an interest founded in equity and justice, and on good and adequate consideration." See also Titcomb *v.* Thomas, 5 Greenl. 282; Littlefield *v.* Smith, 17 Maine, 327; Heath *v* Hall, 4 Taunt. 326; Hastings *v.* McKinley, 1 E. D. Smith, 273; Sexton *v.* Fleet, 2 Hilton, 477; Ross *v.* Smith, 19 Texas, 171; Prescott *v.* Hull, 17 Johns. 284, 292. In the latter case, *Spencer*, C. J. said, that the mere delivery of a chose in action upon a good and valid consideration would be a sufficient assignment of it, even were it a specialty; but that it ought to be alleged, in an action upon it, that the assignment was for a full and valuable consideration, and that it is a subsisting assignment by an averment, that the suit is prosecuted for the benefit of the assignee. See also Davis *v.* Lane, 8 N. H. 224; Grover *v.* Grover, 24 Pick. 261; Hughes *v.* Harrison, 2 La. 89; Savage *v.* King, 17 Maine, 301; Calder *v.* Billington, 15 Maine, 398; Foster *v.* Shattuck, 2 N. H. 446; Thompson *v.* Emery, 7 Foster, 269.

(*r*) See chapter on Guaranty, *post*. A guaranty written upon a negotiable note by the payee is held to operate as an indorsement of it, so as to enable the transferee to sue the maker or other party to it in his own name. Upham *v.* Prince, 12 Mass. 14; Blakely *v.* Grant, 6 Mass. 386; Myrick *v.* Hasey, 27 Maine, 9. But in Tyler *v.* Binney, 7 Mass. 477, somewhat confirmed by Tuttle *v.* Bartholomew, 12 Met. 452, the court seemed inclined to adopt the view that a mere guaranty by the payee of a note could not be treated as an indorsement in blank, transferring the note to the holder, and authorizing him to sue the maker in his own name as indorsee; but in the last case there was the additional objection, that the guaranty was a joint one by the payee and a third person.

but might transfer without indorsement, and that express words to that effect would bind the transferee and all who took from him; still, if the assignment passed to the assignee the whole property in the note, reserving no right in the transferrer, we should think the original negotiability of the note would permit the assignee to sue in his own name, and would cut off any equitable defences of which he had no notice.

SECTION V.

DONATIO CAUSA MORTIS.

Bills and notes may be given *causa mortis*. But if the donor gives a note indorsed to him specially, or payable to him, and not negotiable, so that after his death an action on it must be brought by the executor or administrator of the donor, it was formerly said that the donation is not valid, and that the amount recovered would be assets in the hands of the executor or administrator.(*s*)

But the law upon this point has undergone some changes, and it is now held that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes as a gift *causa mortis*, with a right to use the name of the administrator of the donor to collect it for the donee's own use, and this would be permitted, although such administrator, when the case comes on for trial, appears and protests against it.(*t*)

(*s*) Miller *v.* Miller, 3 P. Wms. 356, is the leading case on this point; and it was there held, that the gift of such a note, being a mere chose in action, could not be a proper subject of a gift *causa mortis*, because no property therein could pass by delivery, and an action thereon must be in the name of the executor. But a bond was considered to be a proper subject of such a gift. Gardener *v.* Parker, 3 Madd 184; Snellgrove *v.* Baily, 3 Atk. 214; Ward *v* Turner, 2 Ves. Sen. 431, 442, per Lord *Hardwicke;* Wells *v.* Tucker, 3 Binney, 366. The distinction formerly made between bonds and other choses in action, as bills of exchange and promissory notes, has been done away with.

(*t*) Chase *v.* Redding, 13 Gray, 418; Bates *v.* Kempton, 7 Gray, 382; Sessions *v.* Moseley, 4 Cush. 87; Grover *v.* Grover, 24 Pick. 261; Borneman *v.* Sidlinger, 15 Maine, 429; Brown *v.* Brown, 18 Conn 410; Turpin *v.* Thompson, 2 Met. Ky. 420; Coutant *v.* Schuyler, 1 Paige, Ch. 316; Parker *v.* Marston, 27 Maine, 196. The delivery of a bond and mortgage as a *donatio causa mortis* is valid. Hurst *v.* Beach, 5 Madd. 351; Duffield *v.* Elwes, 1 Bligh, N. S. 497, 514; s. c. *nom.* Driffield *v.* Hicks, 1 Dow & Clark, 1.

And so it is held that the delivery of such a note *inter vivos* constitutes a valid gift.(*u*)

If the donor gives his own note, this is not a valid gift, and may be defended against by his representatives for want of consideration; (*v*) and the indorsement by the donor of a bill or note made by a third person, and payable to him, while it may

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(*u*) Grover *v.* Grover, 24 Pick. 261. See Milnes *v.* Dawson, 5 Exch. 948, 3 Eng. L. & Eq. 530.

(*v*) Parish *v.* Stone, 14 Pick. 198; Hamor *v.* Moore, 8 Ohio State, 239; Harris *v.* Clark, 3 Comst. 93; Raymond *v.* Sellick, 10 Conn. 480; Holley *v.* Adams, 16 Vt. 206; Smith *v.* Kittridge, 21 id. 238; Copp *v.* Sawyer, 6 N. H. 386; Fink *v.* Fink, 18 Johns. 145. See also Holliday *v.* Atkinson, 5 B. & C. 501; 8 Dow. & R. 163; Flint *v.* Pattee, 33 N. H. 520. *Contra*, see Bowers *v.* Hurd, 10 Mass. 427, which is overruled so far as it rests on the ground of a *donatio causa mortis;* Wright *v.* Wright, 1 Cowen, 598. This latter case has been overruled in Craig *v.* Craig, 3 Barb. Ch. 76; Harris *v.* Clark, 2 Barb. Sup. Ct. 94, 3 Comst. 93, in which cases the subject is considered at great length, and all the cases upon it carefully reviewed. In Hamor *v.* Moore, 6 Ohio State, 239, the action was upon the following paper: "For value received, I promise to pay to Mrs. Hamor, wife of John Hamor, the sum of $ 300, as a small recompense for the kindness shown to me by her. The executors of my last will and testament are hereby directed to pay the above to Mrs. H., or her sons Moses and John, after my decease. John R. Moore. Attest, Philip Riggs. Feb. 28, 1850." This was executed shortly before the death of the promisor, and delivered to the subscribing witness, with injunctions to deliver it to Mrs. H. after his death, which was done. It was held that this was not a good gift *causa mortis*. The reason of this rule is stated by the court in the case of Holley *v.* Adams, 16 Vt. 206, to be, that a mere promise to pay a sum of money is not a gift that becomes complete in the donee upon the death of the donor, as is essential in a *donatio causa mortis*. But the fact that the donor's note, if it constituted any claim against his estate, must be submitted to be allowed before it could be available, shows that it is not a complete gift. And then to support such gifts "might in some instances," say the court, "put whole estates at the mercy of a few interested individuals, who happen to have access to, and who have gained the confidence of, the dying man, and the transaction would be disencumbered of all the salutary checks which the law has thrown around the disposition of property by will, there being no witnesses required, and there being no tribunal instituted by law for the purpose of testing its validity after the decease of the donor; and the very circumstance which sometimes renders a *will* suspicious is the *living principle* in a *donatio causa mortis*."

In Parish *v.* Stone, 14 Pick. 198, the court say that the donor's own note cannot be the subject of such a donation, because it is not an existing available promissory note to any one. It is not a chose in action. It is not a binding contract by the promisor to the promisee; and if it were, it would be open to another objection as a *donatio causa mortis*, namely, that it would not be revocable by the donor. It is simply a promise to pay money, and as such, and as a gift of a sum of money, it wants the essential requisite of an actual delivery. In Bowers *v.* Hurd, 10 Mass. 427, the court, speaking of such a note, say: "We cannot consider it as a *donatio causa mortis*, as was suggested at the bar, for that must be complete at the time, by a delivery of the thing given."

transfer the note as a gift *causa mortis*, will not render his estate liable on his indorsement.(*w*)

If a person gives his own check as an immediate gift, the donee must collect it in the lifetime of the donor,(*x*) otherwise his death revokes the gift, if the check is in the hands of the donee.(*y*) If given as a *donatio mortis causa*, as it was not intended to take effect till after death, the death would not operate a revocation of the gift.(*z*) But the rule which prevents the note of a donor from being a good subject of a donation *causa mortis* would seem to apply equally to a check.

We give in this place only the most general rules applicable to the case of mortuary gifts, because we are obliged to consider them elsewhere, and in other connections.

(*w*) Weston *v.* Hight, 17 Maine, 287. And see Easton *v.* Pratchett, 1 Cromp. M. & R 798, 3 Dowl. 472, 2 Cromp. M. & R. 542.

(*x*) Tate *v.* Hilbert, 2 Ves. Jr. 111; Reddel *v.* Dobree, 10 Sim. 244.

(*y*) Tate *v.* Hilbert, 2 Ves. Jr. 111. In Lawson *v.* Lawson, 1 P. Wms. 441, a testator on his death-bed drew a bill upon his goldsmith to pay £ 100 to his wife, and declared, in a note, in his own handwriting, on the bill, that the money was to buy her mourning, and to maintain her until her jointure should become due. The master of the rolls held the gift valid as a *donatio causa mortis*, and to operate as an appointment; and he further said, that being for mourning, it might operate like a direction given for his funeral, which ought to be observed, although not in his will. Lord *Loughbrough*, afterwards, in Tate *v.* Hilbert, *supra*, says that the decision in Lawson *v.* Lawson was right, but that the report in P. Williams is inaccurate, and does not show the *ratio decidendi;* and that, "taking the whole bill together, it is an *appointment* of the money in the banker's hands to the extent of £ 100 for the particular purpose expressed in a written appointment, which is a purpose that necessarily supposes his death. Therefore that case is perfectly well decided." Upon this, *Ruggles*, J., in Harris *v.* Clark, 3 Comst. 93. 118, remarked, that "if by the word appointment is meant a direction which the executors were to carry into effect, then the paper was testamentary. But the master of the rolls could not have regarded it in that light, for he did not require the paper to be proved in the ecclesiastical court. . . . . But if an 'appointment' meant an appropriation of the money to a specific purpose for the benefit of the wife, then it was in effect an assignment or transfer to her for that purpose, and that is the sense in which I understand the word to have been used." But a draft of the donor, not accepted, for a specific sum, upon a third person who has in his possession funds of the donor, does not operate as an assignment or appropriation to the donor of the sum mentioned in the draft, and therefore is not valid as a gift *mortis causa*. Harris *v.* Clark, 3 Comst. 93. See Billing *v.* Devaux, 3 Man. & G. 565, 571; Rodick *v.* Gandell, 12 Beav. 325; 1 DeG. M. & G 763. See as to a check being an appropriation, Matter of Brown, 2 Story, 502, 516; Dykers *v.* Leather Manuf. Bank, 11 Paige, 612, 617.

(*z*) See the remarks of *Shaw*, C. J, in Sessions *v.* Moseley, 4 Cush. 87, 92.

CHAPTER III.

OF CHECKS.

A CHECK is a brief draft or order on a bank or banking-house, directing it to pay a certain sum of money.(*a*) This instrument is in constant use wherever there are banks or houses of deposit, and is employed in a variety of ways. In England, the use of checks is regulated by statutes,(*b*) with much minuteness; and they are drawn not only on the national bank and on country banks, but on private persons and firms. In this country, so much statute regulation has not been thought necessary as in England. Bank-checks, with us, rest more on the common principles of the law of negotiable paper. Still, they have some important peculiarities, and are met with so constantly, that it is thought best to consider them in a chapter by themselves; although we have already, in considering other topics, antici-

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(*a*) The common form of a check in England is this, taken from Chitty on Bills, p. 147: —

London, 1 January, 1840.

Messrs.

Pay to A B. or Bearer Twenty Pounds.

£ 20.

(Signed,) S. K.

The following is the printed blank of the American check: —

Bank. No.

Dolls. Cts.

Boston, 186

Pay to or Bearer,

Dollars $\frac{00}{100}$.

To the Cashier.

It may be made payable to "A," to "A or order," to "A or bearer," or "to bearer" alone. Harker *v.* Anderson, 21 Wend. 372; Elting *v.* Brinkerhoff, 2 Hall. 459; Boehm *v.* Sterling, 7 T. R. 423; Cruger *v.* Armstrong, 3 Johns. Cas. 5; In re Brown, 2 Story, 502–612. It is usually made payable to bearer, but not universally. Mr Chitty implies this (Bills, 18th ed., ch. 11, p. 545), and M'Culloch asserts it (M'Cull. Dict. of Com., Checks), in this language: "They *nearly resemble* bills of exchange, except *they are uniformly* payable to bearer"; and as is stated in Woodruff *v.* Merchants' Bank of N. Y., 25 Wend. 673.

(*b*) 48 Geo. III. c. 88, 53; 17 Geo. III. c. 30; 7 Geo. IV. c. 6.

pated much of the law of checks, and shall consider them further in future chapters.

A check may be non-negotiable, negotiable by indorsement, or transferable by delivery, accordingly as it is drawn payable to a particular person, or to him or order, or to bearer, or indorsed in blank. It is plain, however, that it is not their principal object or purpose to be negotiated.(*c*)

Bills and notes are intended to be used as money, and take the place of money far more commonly than checks. In this country, checks are usually made payable to bearer, and in England, as we have seen, almost always so, in order to protect them from the stamp duty.(*d*)

The negotiability of checks is defeated by the same causes which defeat the negotiability of bills and notes in general; as by being payable in bank-bills, and the like.(*e*) The check is always considered in England as a kind of inland bill of exchange, and this language is frequently adopted by American writers.(*f*) They are much used here in drawing from one

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(*c*) Checks are said, by Mr. Chancellor *Walworth*, to be made at times for a temporary circulation Mohawk Bank *v.* Broderick, 10 Wend. 304. The negotiability of checks and bills of exchange stands on the same footing. Keene *v.* Beard, 8 C. B., N. S., 372, 23 Law Reporter, 171, 187. And in England, where a check is usually made payable to a person named as bearer, if it is indorsed by such person with the intention of passing a title to it, and to incur the liabilities of an indorser of a negotiable instrument, he becomes liable as such. Keene *v.* Beard, *supra*.

(*d*) Chit. on Bills, 545; Rex *v.* Yates, 1 Moody, Cr. Cas. 170; Conroy *v.* Warren, 3 Johns. Cas. 259, 261. In Elting *v.* Brinkerhoff, 2 Hall, 459, an instrument not negotiable, nor addressed to bankers, was regarded by Mr. Justice *Oakley* as a check. It is to be observed, that the time of payment is not stated in the forms given above; but when this is the case, they are payable on demand, as we shall have occasion to notice hereafter. And see Keene *v.* Beard, 8 C. B., N. S., 372, 23 Law Reporter, 171, 187.

(*e*) Little *v.* Phenix Bank, 2 Hill, 425.

(*f*) Keene *v.* Beard, 8 C. B., N. S., 372, 23 Law Reporter, 171, 187. In Harker *v.* Anderson, 21 Wend. 372, *Cowen*, J. defines a check to be "a bill of exchange, payable on demand." He criticises the expression, that "checks are like bills of exchange," on the ground that '*nihil simile est idem*,' whereas checks *are* bills, "or rather, bill is the *genus*, and check is a *species*." He cited Bochm *v.* Sterling, 7 T. R. 423, 426, per Lord *Kenyon*, and Cruger *v.* Armstrong, 3 Johns. Cas. 5, 7, 8, where *Radcliffe* J. says, "It possesses all the requisites of a bill"; and *Kent*, J., "Checks are substantially the same as inland bills, payable to bearer." In Merchants' Bank *v.* Spicer, 6 Wend. 443, 445, *Marcy*, J. said: "Checks are considered as having the character of inland bills of exchange." So in Murray *v.* Judah, 6 Cowen, 484, 490, per *Sutherland*, J. These general expressions are declared, by Mr. Justice *Cowen*, *supra*, not to be *dicta* merely; but they may perhaps be explained by the cases themselves, and by the fact that the points decided were equally applicable to bills of exchange and checks.

State upon houses of deposit in another; and small sums of money are frequently and very conveniently sent in this way, and it has even been suggested that these checks are foreign bills, and as such subject to protest and damages.(*g*) While a check is used as money in many respects, in others it is only evidence of debt; and the law of gifts, and especially of mortuary gifts, which we have already considered, seems to rest upon this distinction. It is quite certain that a check, when given without any consideration, is not a valid gift, so far as to give an action to the donee against the drawer, or against the indorser who indorses for the purpose of giving it. It is in this respect like a bill of exchange.(*h*)

A check is always supposed to be drawn against funds; and there is much authority for holding it to be in some important respects an appropriation of those funds.(*i*) As soon as the

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So also may the cases Ellis *v.* Wheeler, 3 Pick. 18; Shrieve *v.* Duckham, 1 Littell, 194; Humphries *v.* Bicknell, 2 Littell, 296; Mohawk Bank *v.* Broderick, 10 Wend. 304; Woods *v.* Schroeder, 4 Harris & J. 276; Suteliffe *v.* M'Dowell, 2 Nott & McC. 251; Glenn *v.* Noble, 1 Blackf. 104; Smith *v.* Janes, 20 Wend. 192; Minturn *v.* Fisher, 4 Calif. 35; Barnet *v.* Smith, 10 Foster, 256. We admit that checks are a class of negotiable instruments, and a species of the *genus* bill; but we consider that the species has some distinguishing peculiarities, and this is implied even by Mr. Justice *Cowen*, Harker *v.* Anderson, 21 Wend. 372, 380, in the opinion quoted above, where he says, "Does not the argument apply with *greater force* to common checks?"

(*g*) Per *Cowen*, J., in Harker *v.* Anderson, 21 Wend. 372. But there is no decision to this effect.

(*h*) A check cannot be the subject of a *donatio causa mortis*. See *supra*, p. 56; but if a donee receive the money before the donor's death (in which case it is not properly a *donatio causa mortis*), or before the bank or banker has notice, the gift will be good. The draft of a donor unaccepted was held not good as a *donatio mortis causa*. Harris *v.* Clark, 2 Barb. 94, 3 Comst 93, overruling Wright *v.* Wright, 1 Cowen, 598.

(*i*) The funds cannot properly be withdrawn by the drawer. Chapman *v.* White, 2 Seld. 412; Conroy *v.* Warren, 3 Johns. Cas. 259, 262, 264; Cruger *v.* Armstrong, id. 5, 9; Brown *v.* Davies, 3 T. R. 80; Boehm *v.* Sterling, 7 T. R. 423, 429, 430. See Kemble *v.* Mills, 1 Man. & G. 757. "It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain till called for, unless the drawer suffer by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted." 4 Kent, Com. p 549, note, 4th ed. In Brown *v.* Lusk, 4 Yerg. 210, the judge said: "They are appropriations of so much money in the hands of a banker, and are payable on presentment." Morrison *v.* Bailey, 5 Ohio State, 13; Franklin *v.* Vanderpool, 1 Hall, 78; Hoyt *v.* Seeley, 18 Conn. 353; In re Brown, 2 Story, 502; Robinson *v.* Hawksford, 9 Q. B. 52. But it seems contrary to all reason to say that the check works such an appropriation that the bank could pay the holder when forbidden to do so by the maker. Parsons's Mer. Law, 92; Dykers *v.* Leather Manuf. Bank, 11 Paige, 612, hold it contrary to custom. In Bullard *v.* Randall, 1 Gray, 605, it was held that

drawee has notice of it, he is ordinarily bound to pay it; and a bank should not be permitted to affect the right of a holder of a check to the funds in its hands by refusing to pay it without sufficient reason. It is, however, undoubtedly a general rule, that a drawee who has refused to accept a bill of exchange cannot be sued by the payee upon that bill, nor, without special reasons, for his refusal to accept it. If a check be drawn upon a bank, the bank must have something of the same power and security. And as, in the whole transaction, the bank acts only as the agent of the depositor and drawer, it would seem that the bank would perhaps be bound to refuse, and would certainly be

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a check for a portion of the drawee's funds worked no assignment until presented for payment and accepted by the bank. Even the verbal assent of the cashier when absent from the bank was not binding. In this case a debtor was sued, and the bank summoned as his trustees; he gave his creditor his checks for a part of his deposit. This the creditor delivered to the cashier when absent from the bank, and with it an order for discharge of the trustee process when the amount of the check should be transferred to his account. This did not work such an assignment as would hold good against another trustee process, served before the transfer of the funds on the bank-books. In Harris *v.* Clark, 3 Comst. 93 (see s. c. 2 Barb. 94), it was held by a majority of the court who took part in the decision, that a check worked no assignment. These judges were Ruggles, Gardner, Jewett, and Hoyt; on the other side were Cady, Shankland, and Strong. Brown took no part in the decision. In Chapman *v.* White, 2 Seld. 412, it was expressly held that a check before acceptance neither operates as an assignment nor creates any lien on the funds. In this case the bank of Geneva drew a check on the Canal Bank on the 7th of July, in favor of a party who had a note of the same amount to meet at the latter bank, payable on the 12th of July. The check was received by the cashier of the Canal Bank on the 8th, the payee sending it by mail, with instructions that it was sent to pay his note; but the note was neither indorsed by the cashier nor accepted by the bank. On the 10th the bank failed; and on the 12th the note was presented, when payment was refused. Subsequently the check was returned to the payee, who brought this action against the receiver of the bank to recover the amount of it from the assets of the bank. But it was held that he had acquired no right to be paid the amount of the check in preference to the general creditors of the bank. The court said: "The question upon the facts stated is, whether the draft under these circumstances operated as an assignment of the deposit of the Geneva Bank to the amount of the draft either at law or in equity. The question has been decided by this court. Cowperthwaite *v.* Sheffield, 3 Comst. 243; Harris *v.* Clark, 3 Comst. 93; Winter *v.* Drury, 1 Seld. 525. The instrument in question was an ordinary bill of exchange. It did not purport to be drawn on a particular fund, even if one existed. But there is nothing to show that any part of the deposit of the Geneva Bank was held by the drawees at the time when the draft was received or transmitted, or when the note for the payment of which the proceeds were to be appropriated matured, and was presented at the banking-house of the depositary. . . . . A check is a bill of exchange payable on demand. The drawee owes no duty to the holder until the check is presented and accepted." This decision is approved and followed in Butterworth *v.* Peck, 5 Bosw. 341. So also in Dykers *v.* Leather Manuf. Bank, 11 Paige, 612, it was held that a

justified in refusing, to pay a check, if directed to refuse by the drawer. This is certainly the duty of the bank before it had promised to pay a check, as by certifying it to be good, or in some other way.

While, therefore, we admit that a bank may be liable in a proper action to a holder of a check for a wanton or fraudulent refusal to pay the check, whereby the holder lost the funds, we should say that only in such cases could any action be maintained against the bank for the refusal. We have gathered the cases on this important question in our note.(*j*)

One of the many reasons why the holder of a check, upon the

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mere priority in drawing a check upon a bank, or in demanding payment of it, is not sufficient to give to the holder of it any legal right of preference in payment, and of the funds of the drawer over the holders of checks subsequently drawn, or of which payment has been subsequently demanded. In the case of Fry & Chapman's bankruptcy, in the year 1829, stated in Byles on Bills, p. 17, several holders of checks on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The commissioners took time to consider, and afterwards disallowed the claim. The decision of the early case of Lawson *v.* Lawson, 1 P. Wms. 441, where a testator on his death-bed drew a bill upon his goldsmith for the payment of £100 to his wife, declaring in a note upon the bill that the money was to buy her mourning, and to maintain her until her jointure should become due, seems to have been placed on the ground that it was an appointment of the money in the goldsmith's hands to that extent for the purpose expressed. "But upon that decision," said Lord *Loughborough* in the subsequent case of Tate *v.* Hilbert, 2 Ves. Jr. 111, 121, "I cannot say that, at all events, drawing a cash-note upon a banker is an appointment of the money in his hands." There may be cases where in equity a check might operate as an assignment to the holder; as in case of the death of the drawer and the consequent revocation of the banker's authority to pay, the holder may have relief in equity against the banker." Rodick *v.* Gandell, 12 Beav. 325, 1 DeG. M. & G. 763.

(*j*) The weight of authority rests with the view stated in the text; namely, that, under ordinary circumstances, the bank upon which a check is drawn owes no duty to the holder of it, and is liable to no action by him for refusing to pay the check, though it has sufficient funds therefor. Bellamy *v.* Marjoribanks, 7 Exch. 389, 403, 8 Eng. L. & Eq. 513; Mandeville *v.* Welch, 5 Wheat. 286; Warwick *v.* Rogers, 5 Man. & G. 340; St. John *v.* Homans, 8 Misso. 382; Levy *v.* Cavanagh, 2 Bosw. 100; National Bank *v.* Eliot Bank, Superior Ct. Suffolk Co., Mass., 20 Law Reporter, 138; Chapman *v.* White, 2 Seld. 412; Dykers *v.* Leather Manuf. Bank, 11 Paige, 616. And see also Sims *v.* Bond, 5 B. & Ad. 389; Carr *v.* Carr, 1 Meriv. 541, note; Devaynes *v.* Noble, 1 Meriv. 568. It does not avail to bind the bank in any way, that the holder of the check gives notice to the bank of his holding the check; or even that the cashier of the bank, when absent from it, has verbally assented to the drawing of the check. Bullard *v.* Randall, 1 Gray, 605. In Bellamy *v.* Marjoribanks, 7 Exch. 403, 8 Eng L & Eq. 523, Baron *Parke* remarked, that a holder "could not sue the drawee unless he had accepted the check, a practice not usual." The judge, in Chapman *v.* White, 2 Seld. 412, also remarks: "The right of a depositor is a chose in action. It is immaterial whether the implied engagement upon the part of the banker is to pay the sum in gross or in parcels

refusal of the bank to pay it, having sufficient funds of the drawer therefor, cannot maintain an action against the bank, is the existence of such a right of action on the part of the drawer, who may sue the bank in tort for the wrong done, or in assump-

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as it shall be required by the depositor. In either case, the draft or check of the latter would not of itself transfer the debt or a lien upon it to a third person without the consent of the depositary." Dykers *v.* Leather Man. Bank, 11 Paige, 612, held that when a customer had given checks exceeding in the aggregate his funds in the bank, and had forbidden the bank to pay, and finally had drawn out his funds to make ratable distribution among the check-holders, that the owner of a check presented before withdrawal of the funds, but after orders not to pay, could maintain no action against the bank, that mere priority in drawing a check does not give the holder the preference and priority in payment over the holders of checks drawn subsequently. In Pope *v.* Luff, 7 Hill, 577, the drawee refused to accept the bill, but promised to pay the holder by a given day. The holder was not allowed to maintain an action against the drawee, though he ought to have accepted The question whether the holder of a bank-check can maintain an action in his own name against a bank having sufficient funds of the drawer, for refusing to pay the same, was much discussed in a late case in the Superior Court of Massachusetts for Suffolk Co., National Bank *v.* Eliot Bank, 20 Law Reporter, 138, 5 Am. Law Reg. 711. The case was tried before a full bench, and it was decided that such an action would not lie. Mr. Justice *Abbott* dissented, in an able opinion, and rested his argument upon the principle, that, when money is paid by A to B, for C, the latter may sue B in his own name, if he refuse to pay over the same; Farmer *v.* Russell, 1 B. & P. 296 (22 Am. Jur. 17, 2 Greenl. Ev. 109; Arnold *v.* Lyman, 17 Mass. 400; Hall *v.* Marston, 17 id. 575; Felton *v.* Dickinson, 10 Mass. 287; Carnegie *v.* Morrison, 2 Met. 402; Fulton *v.* Poole, T. Raym. 302); and secondly, upon the general understanding and intent of the parties, concluded that the action ought to lie. See Weston *v.* Barker, 12 Johns. 276; Fenner *v.* Meares, 2 W. Bl. 1269, which were not on the point, but go a little further than the cases cited *supra*. Fenner *v.* Meares was exploded in Johnson *v.* Collings, 1 East, 104, and at the time *Blackstone*, J. did not fully agree with *De Grey*, C. J. In a very late case in South Carolina, the same doctrine with Mr. Justice *Abbott's* was held, the Chief Justice, *O'Neall*, however, dissenting (q. v.). This case was decided in February, 1860. Fogarties *v.* State Bank, 8 Am. L. Reg. 393. The opinions are very long and able. The case, in Massachusetts, of the National Bank *v.* Eliot Bank, was before the court. The grounds of the decision are the implied contract of the bank; the general understanding of the commercial world, and the interests of trade; much weight is given to the *ex æquo et bono* argument, and because the bank was wrong in refusing, the court thinks the holder has a *right* of action. The case of Dunlap *v.* Silver, 1 Cranch, 440, Appendix A, is cited, and the cases of wagers recovered from a stake-holder, in which the right to the money is altered by the cast of a die, per Lord *Holt*. The strongest authority, however, which we find quoted is Weston *v.* Barker, 12 Johns. 276, in which case it appeared that A had assigned certain securities to B, to apply the proceeds to certain purposes, and hold the balance subject to his order; he gave an order to C, who was allowed to recover against B, on an action for money had and received; for it was held that the acceptance of the trust was equivalent to an express promise on the part of B to pay to the person whom A should appoint. *Spencer*, J., however dissented, and *Platt*, J. delivered no opinion, not having heard the arguments See M'Kim *v.* Smith, 1 Hall's Law Journ. 486, which is criticised by *Spencer*, J. and *Kent*, C. J., in M'Evers *v.* Mason, 10 Johns. 213. The opinion of Chief Justice

sit for the breach of the implied contract to honor promptly the customer's checks.(*k*) In such action nominal damages may be recovered, though no actual damage be shown; the jury have a right to assume that the wrongful refusal to pay the check would be to some extent injurious to one in trade in every case, and they may further take into consideration, in estimating the damages, the natural and necessary consequences of such refusal, and may award such damages as they may reasonably judge to be a fair compensation for the injury the plaintiff must have sustained from the dishonor.(*l*) Perhaps, in case such an action

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O'Neall, in Fogarties *v.* State Bank, is well put: "Unless in law there is foundation for an implied contract, the plaintiffs have nothing upon which they can stand. There is no such foundation, for the contract is express with the depositor, and there cannot be both an express and an implied contract. The holder of the check cannot sue on the deposit. That gives a right of action to the depositor, and, as we have seen, he may sue and recover. It seems to me that there is no right of action, and I make no inquiry as to what may be the notions of bankers or their customers. If they think a different course from that which I have pointed out best subserves the purposes of business, they have only to pursue it, and not ask the aid of the law. If they think my conclusion is right, then I can only say I regret that hereafter we shall be governed by a different rule."

(*k*) Marzetti *v.* Williams, 1 B. & Ad. 415, 1 Tyrw. 77, note *b*; Rolin *v.* Steward, 14 C. B. 595. It appeared at the trial of the case of Marzetti *v.* Williams, that the plaintiff drew a check on the defendants, who were his bankers, to whom it was presented at a time when there were ample funds of the plaintiff's in their hands to meet it; but the check was dishonored for want of assets, through the inadvertence of the banker's clerk, in not entering to the plaintiff's credit in the ledger a payment that had been made to his account in the morning. The check was again presented the following morning, and paid. The jury found that when the check was presented for payment, a reasonable time had elapsed to have enabled the defendants to enter to the plaintiff's credit the money they had received for him, and the Court of King's Bench held that the refusal to pay the check, under such circumstances, was a breach of duty for which an action would lie, upon which the plaintiff might have a verdict for nominal damages, although it did not appear that he had sustained any actual damage, and there was no malice on the part of the defendants. Independently of other considerations, the credit of the drawer of the check is likely to be injured by the dishonor of his check; and if he is a trader, he may be considered as in fact injured by the banker's refusal to pay the check when it is presented.

(*l*) Rolin *v.* Steward, 14 C. B. 595. In this case the jury, having returned a verdict for £500 damages to the plaintiff in an action against his banker for dishonoring his checks when there were sufficient assets in the banker's hands to meet them, the court were of opinion that the jury had awarded a very large sum under the circumstances, as the banker had, previous to the drawing of the checks, notified the plaintiff that he must arrange with the bank if he desired any more checks to be paid, and at the suggestion of the court the parties ultimately agreed to fix the damages at £200. No evidence was offered that the plaintiff had sustained any special damage. But the court were of opinion that, it being alleged and proved that the plaintiff was a trader, the

is brought by one not a trader, it would be necessary to allege and prove special injury, in order to obtain substantial damages.(*m*) Even an agent who has paid in to his own private banking account funds belonging to an undisclosed principal, and which had been improperly obtained by the agent, may, upon the bank's refusal to honor his check against such funds, recover damages for such refusal.(*n*)

Though usually drawn payable to bearer, very commonly, where a check is for a large amount, and especially if it is to be sent to any considerable distance, it is drawn payable to order. Then if it be lost or stolen before it is indorsed, the loss does not fall on the drawer or the drawee; for the bank cannot pay it before indorsement. Sometimes it is drawn in this way merely to secure the receipt of the person in whose favor it is drawn. Whatever the reason of this may be, if a bank pay a check so drawn, and with a forged indorsement, it is the same thing as if it pay a check with the drawer's name forged.(*o*) In New York,

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jury, in estimating the damages, might take into consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of the contract; just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage.

(*m*) Per *Williams*, J., in Rolin *v.* Steward, 14 C. B. 595.

(*n*) Tassell *v.* Cooper, 9 C. B. 509. A., the farming bailiff of Lord D. (after his employment as such had ceased), received a check for £ 180, in payment for wheat belonging to Lord D., which he had sold on his account while acting as bailiff, and paid it in to his own account with B. & Co., his bankers, who received the cash for it, and gave A. credit for the amount, but afterwards, under an indemnity from Lord D., refused to honor his drafts. In an action to recover damages for the dishonor of two checks drawn against such funds, special damages being alleged, it was held that, even assuming the funds to have been improperly obtained by the agent, there was an implied undertaking on the part of the bank to pay his checks, and that not having done so, they were responsible to him in damages.

(*o*) Moreau *v.* Bank of the State of N. Y., 1 Duer, 434, 1 Kern 404; Robarts *v.* Tucker, 16 Q. B. 560. In Smith *v.* Mechanics' & Traders' Bank, 6 La. Ann. 610, the plaintiff was a broker, and deposited with the defendant bank. A certain bill of exchange, purporting to be in favor of one Garland, was drawn on Paine & Harrison, a well-known firm in New Orleans. The bill was indorsed by Garland, of whom no account was given, so that the name is supposed to have been fictitious. The acceptance of Paine & Harrison was forged. The plaintiff discounted the bill for a stranger, but to protect himself drew the check on the defendant bank, payable to the orders of the alleged acceptors, Paine & Harrison. "Paine & Harrison" was forged on the check, and the bank paid it. Under these circumstances, the bank was held to be excused. This opinion, however, was not unanimous, and the ground seems to have been that the greatest good faith was required between bank and customer, and that

and perhaps elsewhere, it is common to draw checks payable "to the order of bills payable," or to the order of a number (as to the order of No. 1176), or by some similar phrase, to express that negotiability which only exists in connection with the word order. But as such a check cannot be indorsed by any party, it has been held, for obvious reasons, to be a check payable to bearer, and of course transferable by delivery.(*p*)

In England there is a custom of crossing checks with the banker's name through whom the check is to be paid. How far this may act as a restrictive indorsement, and how far, not being a restrictive indorsement, it may go to show negligence in the banker who pays it to a person whose name is not crossed, is much discussed in a late case.(*q*) The custom is held not to operate as a restrictive indorsement, and the circumstance that a check is crossed is material, not in determining whether a third party was guilty of negligence in taking it, but in considering whether he took it in good faith and for value.(*r*)

The custom was shown to have arisen among the clerks at the clearing-house, who were in the habit of writing their employers' names across the checks simply to facilitate the settlements. And it extended and is now sanctioned by statute, because a crossed check must by usage be paid through some banker, and when so paid it may be traced more easily, if it should have been lost or stolen, and so fallen into wrong hands.(*s*)

The crossing does not form any part of the instrument itself, and therefore its erasure does not amount to a forgery, or prevent the banker upon whom it is drawn from paying it otherwise than through another banker, and availing himself of such payment as a valid charge against the drawer.(*t*) This is the case even under the recent statute in England,(*u*) which makes the

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the buyer of negotiable paper must take care, which doctrine was long ago abandoned. See *post*, as to the payment of forged checks.

(*p*) Willets *v.* Phœnix Bank, 2 Duer, 121.

(*q*) Bellamy *v.* Marjoribanks, 7 Exch. 403, 8 Eng. L. & Eq. 513; and see Simmons *v.* Taylor, 2 C. B., N. S., 528, 4 id. 463; Boddington *v.* Schlencker, 4 B. & Ad. 752.

(*r*) Carlan *v.* Ireland, 5 Ellis & B. 765, 34 Eng. L. & Eq. 130.

(*s*) Bellamy *v.* Marjoribanks, *supra;* Stewart *v.* Lee, Moody & M. 158.

(*t*) Simmons *v.* Taylor, 2 C. B., N. S., 528; affirmed in the Exchequer Chamber, 4 C. B., N. S., 463; Bellamy *v.* Marjoribanks, *supra;* Carlan *v.* Ireland, 5 Ellis & B. 765, 34 Eng. L & Eq. 130; Stewart *v.* Lee, Moody & M. 158.

(*u*) 19 & 20 Vict. c. 25. This statute provides that, "Whereas doubts have arisen

crossing operate as a positive direction to the banker on whom it is drawn not to pay it except through some banker, whereas the custom before the statute had not the force of a peremptory direction, but only made it incumbent upon the banker to use a greater degree of caution in paying the check.

It has been said that the word "memorandum," or "mem.," written on the check would not affect the right of the holder.(*v*) We think this might have been doubted, because there is a well-known custom in all our commercial cities of drawing and using checks in this form merely as due-bills, or as what they are called and are, "memorandum checks." But it is also usual to run a pen through the name of the bank in memorandum checks; and if this were omitted, and the name left, perhaps the holder might lawfully present it and demand payment.(*w*)

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as to the obligations of bankers with respect to cross-written drafts; and whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker"; be it therefore enacted, that "In every case where a draft on any banker made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker."

(*v*) Dykers *v.* Leather Manuf. Bank, 11 Paige, 612. It was held that the insertion of the word "*mem.*" in a check upon a bank in New York did not affect the negotiability, or the right to present and demand payment immediately. Where such check being paid exhausts the funds, no claim arises against the bank in favor of holders of other checks presented on the same day which are not paid. Id. A custom was attempted to be shown, that, in Wall Street, *mem.* was intended to limit the effect of checks, but it was not satisfactorily shown. "The weight of the testimony is, that this memorandum amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment so as to destroy the drawer's credit with the bank, when he has not provided funds to meet the draft."

(*w*) The name of the bank has been sometimes erased, as appears in Ball *v.* Allen, 15 Mass. 433, (1819,) where the following instrument was sued upon: —

"*Union* Bank."

100 dollars cents. Boston, Oct. 17, 1816.

Pay to No. 100 ..... or bearer, one hundred dollars $\frac{00}{100}$

To the Cashier. For account of James Allen.

The check was a common one, with the name Union cancelled, by a line drawn through it. This was held per *Parker*, C. J. not to import a consideration, and the plaintiff was nonsuited. In Ellis *v.* Wheeler, 3 Pick. 18, we have a case in which there was a regular memorandum check, and the name of the bank erased also. It was re-

A check may be drawn on any house of deposit, but is most usually drawn in this country only on banks, because there deposits are usually kept. Usually it is payable on demand,(*x*) but sometimes it bears date as of a future day, and then is pay-

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covered on against the drawer, *value* given, and *bona fides* having been proved. The following was the form : —

Memdm. *State* Bank. No. 100 doll. cts.
May 29, 1819. Pay to Capt. Cazneau or bearer, &c.
To the Cashier. Elisha Wheeler.

The word "State" was cancelled. In Franklin Bank *v.* Freeman, 16 Pick. 535, the following instrument was before the court : —

Market *North* Bank, Memo.,
1000 dolls. cts. Boston, Aug. 27, 1833.
Pay to Payable, Friday, 30 inst., or bearer, one thousand dollars 100
To the Cashier. Benj. Freeman.

The word "North" was cancelled by two lines drawn through it. Mr. Justice *Putnam* said : "A memorandum check is a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum' written or printed upon the check describes the nature of the contract with precision." The presentment and notice were held to be waived. It appeared in this case, that the word "Market" was written by the defendant, and that at the latter bank he had funds. This, it was contended, showed that presentment should be made there ; that if he had intended a "memorandum check," it would have been unnecessary to substitute the name of one bank for another. But the word memorandum was held to control this. It seems, then, from the New York and Massachusetts cases, that "memorandum" waived presentment and notice, whether the name of the bank be cancelled or not ; but that if it be not cancelled, the holder may at his option treat the check like any other as to demand and notice. In Kelley *v.* Brown, 5 Gray, 108, it was held that a check in the common form could not be shown by parol evidence to be a memorandum check, and not intended for presentation, and so excusing the holder from presenting before he charged the drawers.

(*x*) In Harker *v.* Anderson, 21 Wend. 372, it is said that checks must be on *demand*. Bowen *v.* Newell, 4 Seld. 190. As will be seen by consulting the forms *supra*, this does not appear on their face ; but by express or legal implication such seems to be the case, when no time or conditions are stated. And this is true as to all negotiable papers. Whitlock *v.* Underwood, 2 B. & C. 157, 3 D. & R. 356. In Brown *v.* Lusk, 4 Yerg. 210, the instrument in question was payable at a day certain. It was held not to be a check. This was on the authority of Chitty (Bills, 7th Am. ed. 322). It may, perhaps, be asked, Why pronounce that *not* a check which is plainly a bill of exchange, if there is no distinction to be taken between them ? So if it be post-dated, and not stated to be "payable on demand." In re Brown, 2 Story, 502. The check was as follows : —

Boston, Apr. 18, 1841. Pay W. Courtis & Co., 18th May, or bearer seven hundred three dollars. Ephraim Brown, by J. W. Green.
To Cashier.

able only when that day comes; but then it is said to be payable without grace, on the ground that it is presumed to be drawn against funds on deposit, and grace is not required to provide for it as for bills of exchange.(*y*)

If, however, it be correctly dated on the day on which it is

But checks, though on demand, must be demanded, which is not the case with promissory notes. In an action against the drawer, demand and refusal before suit brought is an essential preliminary. Murray *v.* Judah, 6 Cowen, 484; Daniels *v.* Kyle, 5 Ga. 245; Sherman *v.* Comstock, 2 McLean, 19; Strader *v.* Batchelor, 8 B. Mon. 168. See also, as to cash-note in England, Grant *v.* Vaughan, 3 Burr. 1516, 1 W. Bl. 485. And evidence that the check was only intended as evidence of money lent is inadmissible to charge the drawee, without presentment. Kelley *v.* Brown, 5 Gray, 108.

(*y*) Veazie Bank *v.* Winn, 40 Maine, 60, per *Tenney*, J.; Westminster Bank *v.* Wheaton, 4 R. I. 30; In re Brown, 2 Story, 502, 512, 514; Osborne *v.* Smith, decided in Superior Court of the City of New York, cited in Kilgore *v.* Bulkley, 14 Conn. 366; Taylor *v.* Wilson, 11 Met. 44, per *Hubbard*, J.; Salter *v.* Burt, 20 Wend. 205; Mohawk Bank *v.* Broderick, 10 Wend. 304, 13 id. 133; Bowen *v.* Newell, 4 Seld. 190; Woodruff *v.* Merchants' Bank of N. Y., 25 Wend. 673. In In re Brown, *supra*, *Story*, J. says: "We all know, from the history of inland bills of exchange, that originally they were not entitled to days of grace; and that days of grace were first established, as applicable to them, by the statutes 9 & 10 Wm. III. ch. 17, and 3 & 4 Anne, stat. 2, ch. 9. In Massachusetts, days of grace were not formerly allowed upon promissory notes, payable at a future time; and the like rule was supposed to apply to inland bills of exchange, or at least the contrary was not established. This rule, in Massachusetts, was altered by the stat. of 1824, ch. 130, and by the Revised Laws of 1835, stat. 12, ch. 33, §§ 5, 6, which allows days of grace upon all bills of exchange payable at sight, or at a future day certain, and on all promissory negotiable notes, orders, or drafts payable at a future day certain. But no mention whatsoever is made, in either statute, of checks; but they are silently left to the known rules, practice, and usages of banks, which I believe to be invariable, never to accept them prior to payment, and always to pay them on presentment on or after the day stated for payment by the date, or upon the face of the check." The weight of judicial authority seems to be with the cases above cited, which hold that no allowance of days of grace is to be made upon checks payable on a specified day, or so many days after date. There are cases, however, which hold that such checks are entitled to days of grace by the law merchant. Such are the decisions in Ohio, Tennessee, California, Delaware, and New York. Morrison *v.* Bailey, 5 Ohio State, 13; Andrew *v.* Blachly, 11 id. 89; Brown *v.* Lusk, 4 Yerg. 210; Minturn *v.* Fisher, 4 Calif. 35; Bradley *v.* Delaplaine, 5 Harring Del. 305; Taylor *v.* French, 4 E. D. Smith, 458; Bowen *v.* Newell, 5 Sandf. 326, 4 Seld. 190, 2 Duer, 584, 3 Kern. 290. In New York, however, it is provided by a recent statute, entitled "An Act in relation to commercial paper," passed April 17, 1857, that checks and drafts, appearing on their face to be drawn upon banks, banking associations, or individual bankers, carrying on business under the act to authorize the business of banking, payable on any specified day, or in any number of days after the date or sight thereof, shall become due and payable without any days of grace being allowed; and that it shall not be necessary to protest the same for non-acceptance. The allowance of days of grace upon bills and notes was in the first place a matter of usage, and it would seem a custom or usage either for or against such an allowance upon checks is admissible in determining the right to it. Per *Jones*, C. J., in Osborne *v.* Smith, cited 14 Conn. 366

drawn, but expressly made payable on a future day, we know no sufficient reason why it should not have grace. The authorities, however, differ, not only on this point, but, as our notes will show, on the whole law of post-dated checks.(z) In England, the statute 55 Geo. III. c. 184, provides that "all drafts or orders for

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This question of usage was much discussed in the case of Bowen *v.* Newell, 4 Seld. 190, 5 Sandf. 326, 2 Duer, 584, 3 Kern. 290; and the case was finally decided on the ground that the check, being payable in Connecticut, was governed by the usage of the banks in that State as to the allowance of grace; and it being proved that by such usage there was no allowance of days of grace, it was held that the check was payable without grace. A usage must be general, in order to govern as to payment of a check with or without days of grace; evidence of a usage strictly local will not be received in evidence. Woodruff *v.* Merchants' Bank, 25 Wend. 673, 6 Hill, 174; Morrison *v.* Bailey, 5 Ohio State, 13. The rule in Ohio, as stated in Morrison *v.* Bailey, has been greatly modified and limited by the recent decision in the case of Andrew *v.* Blachly, 11 Ohio State, 89. The court in this case decide that the circumstance that a draft for money in the form of a check payable on a future specified day, is *prima facie*, but not conclusive, evidence that the instrument is a bill of exchange, and as such entitled to days of grace. Although payable at a future day, it is a check, and not a bill of exchange, if it was drawn upon a bank or banker, and is designed by the parties as an absolute transfer and appropriation to the holder of so much of an actually existing fund belonging to the drawer in the hands of the drawee; and in such case it is not entitled to days of grace.

(z) In Serle *v.* Norton, 9 M. & W. 309; Allen *v.* Keeves, 1 East, 435; Whitwell *v.* Bennett, 3 B. & P. 559, a post-dated check was held altogether void. It is held or implied that such an instrument is payable on the day it is dated in the following cases: Boyd *v.* Emmerson, 2 A. & E. 184, per *Denman*, C. J., Boddington *v.* Schlencker, 1 Nev. & M. 540, 4 B. & Ad. 752; Hill *v.* Gaw, 4 Barr, 493. See Regina *v.* Taylor, 1 Car. & K. 213. In Watson *v.* Poulson, Exch. 1851, 7 Eng. L. & Eq. 585, it is said that a post-dated check was not absolutely void, if paid without knowledge of its false date. In Walker *v.* Geisse, 4 Whart. 252, a check was indorsed the day before its date. Post-dated as well as ante-dated checks are payable on presentment at any time after date. Mohawk Bank *v.* Broderick, 10 Wend. 304, 13 id. 133; In re Brown, 2 Story, 502, 512; Salter *v.* Burt, 20 Wend. 205. In the case of In re Brown, 2 Story, 502, it is said that "a check is not less a check for being post-dated, and thereby becomes in effect payable at a future and different time from that on which it was drawn or issued" This is a very full case on the subject of checks. *Story*, J. says, *inter alia*: "Thus, if a check be dated on the 1st of December, and be payable on the 10th of December, it is presentable on the latter day, and on presentment on that day will be paid by the bank. It is never presented for acceptance, and no days of grace are allowed upon it. In short, it is always treated as payable on the very day designated as the day of payment." In Brown *v.* Lusk, 4 Yerg. 210, a check drawn on the 13th of December, 1827, and made payable to A. B. or bearer, at the Branch Bank of the United States at Nashville, on the 14th of January following, was held an inland bill of exchange, and entitled to grace. *Catron*, C. J. was absent, and no authorities on the point were cited. It is of some importance to discover whether an order so drawn is or is not a check; for at common law inland bills were not entitled to days of grace. As to them, days of grace were established by 9 & 10 Wm. III. ch. 17, and 3 & 4 Anne, stat. 2, ch. 9. In Massachusetts, the rule was origi-

the payment of money to the bearer on demand, and drawn upon any bank or bankers, or any person or persons acting as bankers, within *ten* miles (now fifteen, by 9 Geo. IV. c. 49) of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes," &c. shall be exempt from stamp duties. Of course, *post-dated* checks are excluded from

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nally to allow no days of grace on promissory notes. This was changed by statute (1824, ch. 130, Rev. L. 1835, stat. 12, ch. 33, §§ 5, 6). Now grace is allowed upon (Gen. Stat. Mass. 1860, ch. 53, §§ 15, 16, p. 294) bills of exchange payable within the State at sight or at a future day certain, on promissory negotiable notes, orders, and drafts payable within the State at a future day certain, in which there is not an express stipulation to the contrary, in like manner as it is allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight. "The provisions of the preceding section shall not extend to any bill of exchange, note, or draft, payable on demand." A post-dated check, like the one in Brown *v.* Lusk, is "payable at a future day certain," and there is no express stipulation against days of grace. Would the nature of checks so drawn make them come under the exception in the 16th section? In Bowen *v.* Newell, 4 Seld. 190, overruling 5 Sandf 326, the question arose, whether the following instrument was entitled to days of grace: —

N. York, October 5, 1849.

Cashier of Thomson Bank, pay Zenas Newell or order two thousand dollars on the 12th inst. (Signed,) B. Searls & Son.
(Indorsed,) Zenas Newell.

It was held that this was entitled to days of grace, upon the authority of Woodruff *v.* Merchants' Bank, 25 Wend. 673, in error, 6 Hill, 174, the judge saying that he was unable to distinguish between the case of a check made payable as above and one payable "7 days after date." It does not seem to us essential that a check should be drawn on a *bank*, or that it should be payable to bearer; and we cannot distinguish the instrument in Woodruff *v.* Merchant's Bank from a bill of exchange. It was as follows: —

$1,500. Detroit, Nov. 15, 1838.

Sixty days after date, pay to the order of Daniel Green, Esq., fifteen hundred dollars, at the Phœnix Bank in the city of N. Y., value received, which place to account.

Your ob. serv't,

To Wm. H. Griswold, Esq., L. Godard,
Cashier Oakland County Bank. Detroit, Mich.

In the case of Bowen *v.* Newell, 4 Seld. 190, it was finally decided, upon a second trial in the Superior Court, and appeal to the Court of Appeals, that the check was not payable with grace, it being shown that in Connecticut, where the check was made payable, there was a general usage not to allow days of grace; and this case is distinguished from the case of Woodruff *v.* Merchants' Bank, 25 Wend. 673, where the usage was not allowed to control, in the fact that the usage in the latter case was a local one. See 2 Duer, 584; 3 Kern. 290.

the exemption, and fall within the stamp act.(*a*) As a check is payable on presentment, it cannot, in the usual course of business, be presented for acceptance.(*b*) But it must be presented within a reasonable time in order to charge the drawer or indorser in case of failure of the drawee. The fact that it is presumed to be drawn against deposited funds makes it of even greater importance than in the case of a bill that a check should be presented, and that the drawer should be notified of the nonpayment, and that he and any indorser should be discharged by neglect of notice.(*c*)

It has sometimes been said that this was indispensable, even where there were no funds.(*d*) Where there is no presentment of the check or no notice, there is of course a presumption of injury to the drawer. But is this presumption absolute? We should say not; and that it was rebutted by proof that the check was not drawn against funds, or that the funds on which it was drawn were removed by the drawer before presentment of the check.(*e*) So it has been held, that a drawer who has stopped

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(*a*) The penalties are extremely severe for violation of the provisions of the act. But where defendants, knowing that the check was void because post-dated, and that the drawers were insolvent, made presentment to the bankers, who paid the amount innocently, though they had no funds, but expected some in the course of the day, it was held that the bankers could maintain an action for money had and received. Martin *v.* Morgan, Gow, 123, 1 Brod. & B. 289, 3 J. B. Moore, 635.

(*b*) Per *Jones*, C. J., in Osborne *v.* Smith, cited in Kilgore *v.* Bulkley, 14 Conn. 366.

(*c*) Cruger *v* Armstrong, 3 Johns. Cas. 5; Harker *v* Anderson, 21 Wend. 372; Murray *v.* Judah, 6 Cowen, 484; Lilley *v.* Miller, 2 Nott & McC 257; Brown *v.* Lusk, 4 Yerg. 210; Tassell *v.* Lee, 1 Ld. Raym 743; Foster *v.* Paulk, 41 Maine, 425; and see also Camidge *v.* Allenby, 6 B. & C. 373; Taylor *v.* Young, 3 Watts, 343; St. John *v.* Homans, 8 Misso. 382; Reid *v* Reid, 11 Texas, 585.

(*d*) Cruger *v.* Armstrong, 8 Johns. Cas. 5, 8, 9; Edwards *v.* Moses, 2 Nott & McC. 433; Cathell *v.* Goodwin, 1 Harris & G. 488; English *v.* Trustees Indiana, &c. University, 6 Ind. 437.

(*e*) Healy *v.* Gilman, 1 Bosw. 235; In re Brown, 2 Story, 502, 519; Eichelberger *v.* Finley, 7 Harris & J 381; Franklin *v.* Vanderpool, 1 Hall, 78; Fitch *v.* Redding, 4 Sandf. 130; Pack *v.* Thomas, 13 Smedes & M. 11; Humphries *v.* Bicknell, 2 Littell, 296; Case *v.* Morris, 31 Penn. State, 100; True *v.* Thomas, 16 Maine, 36; Kemble *v.* Mills, 1 Man. & G. 757; Foster *v.* Paulk, 41 Maine, 425. The case of Bickerdike *v.* Bollman, 1 T. R. 405, was among the first, if not the first, in which it was held that drawing without funds is a fraud, and takes away from the drawer the right to exact notice. We do not see that there is any difference between originally having no funds in the hands of the drawee and withdrawing them before the bill is presented. See Valk *v.* Simmons, 4 Mason, 113; Commercial Bank *v.* Hughes, 17 Wend. 94; Harker *v.* Anderson, 21 Wend. 372; Lilley *v.* Miller, 2 Nott & McC. 257; Mohawk Bank *v.* Broderick, 10 Wend. 304; Blankenship *v.* Rogers, 10 Ind. 333;

payment may be sued without averment of notice, or proof of it if averred.(*f*) It has, however, been held in New York, that, when a plaintiff relies upon facts to excuse notice, he must state them in his complaint; and an averment of due notice is not sustained by proof of excusing facts.(*g*) The rule of reasonable time is generally the same as to drawer and indorser, in case of the failure of drawee. And in most cases it is held that a check should be presented the day after it is received.(*h*)

If a check be presented long after date, and is refused payment, not on account of a failure, but because the drawer has closed his account or withdrawn his funds, the drawer is still liable.(*i*) Where the drawer, drawee, and payee of a check live in the same place, the payee has still a day for his presentment.

Spangler *v.* McDaniel, 3 Ind. 275, *Savage*, C. J. In Levy *v.* Peters, 9 S. & R. 125, 127, although proof of presentment was dispensed with under special circumstances, *Tilghman*, C. J. said: "In general there cannot be a recovery without proof of a demand and *notice to the drawer.*"

(*f*) Purchase *v.* Mattison, 6 Duer, 587; Devoe *v.* Moffat, Anthon, N. P. 162; Jacks *v.* Darrin, 3 E. D. Smith, 557; Spangler *v.* McDaniel, 3 Ind. 275; Watson *v.* Poulson, 15 Jur. 1111; Whaley *v.* Houston, 12 La. Ann. 585.

(*g*) Little *v.* Phenix Bank, 2 Hill, 425. The English cases on this point are in conflict with each other. See Carter *v.* Flower, 16 M. & W. 750; Thomas *v.* Fenton, 5 Dowl. & L. 28; Jones *v.* Broadhurst, 9 C. B. 173, 190.

(*h*) Ritchie *v.* Bradshaw, 5 Calif. 228; Moule *v.* Brown, 4 Bing. N. C. 266, 5 Scott, 694; Veazie Bank *v.* Winn, 40 Maine, 60; Mohawk Bank *v.* Broderick, 10 Wend. 304, 13 id. 133. In Appleton *v.* Sweetapple, B. R. Mich. 23 Geo. III., a bill payable in London on demand was given to the plaintiff at 1 o'clock in the afternoon, and he did not present it till the next morning; the question was, if he presented it in time. Lord *Mansfield* left the point to the jury, who found for the defendant. A new trial was granted, on the ground that it was a matter of law; the jury found again for the defendant, against the direction of the judge; this was set aside; but the same verdict resulted from the new trial, and then the court refused to disturb the verdict. Bayley on Bills, 226, note 46, ed. 1836. In Hankey *v.* Trotman, 1 W. Bl. 1, the plaintiff, a banker, held a bill on the defendant, for which the latter gave him a draft upon another banker at 12 o'clock. This the holder got marked for acceptance that night; but before the next morning the drawee stopped payment. The jury found for the defendant, and were held (*Wright*, J. *dubitante*) to be sufficient judges whether the plaintiff had had time enough to recover his money. Robson *v.* Bennett, 2 Taunt. 394; Beeching *v.* Gower, Holt, N. P. 313; Rickford *v.* Ridge, 2 Camp. 537, allowed presentment on the day following the receipt. Reynolds *v.* Chettle, 2 Camp. 596; Merchants' Bank *v.* Spicer, 6 Wend. 443; Boddington *v.* Schlencker, 4 B. & Ad. 752, 1 Nev. & M. 540; Alexander *v.* Burchfield, 7 Man. & G. 1061, Car. & M. 75, 3 Scott, N. R. 555; Shrieve *v.* Duckham, 1 Littell, 195.

(*i*) Robinson *v.* Hawksford, 9 Q. B. 52; Mullick *v.* Radakissen, 9 Moore P. C. 46, 28 Eng. L. & Eq. 86; Conroy *v.* Warren, 3 Johns. Cas. 259; Murray *v.* Judah, 6 Cowen, 484; Elting *v.* Brinkerhoff, 2 Hall, 459; In re Brown, 2 Story, 502.

But if it is drawn on a distant place, it has been held, in England, that the payee has until the next secular day to forward it, and his agent has till the day after receiving it for presentment and demand.(*j*) As between the holder of a check and an indorser of it, or the transferrer and the drawer, there can be no doubt that it must be presented for payment within a reasonable time; and it seems, by the best authority, that this is the same time as required in the case of a bill or note.(*k*) But as be-

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(*j*) Smith *v.* Janes, 20 Wend. 192; Moule *v.* Brown, 4 Bing. N. C. 266; Rickford *v.* Ridge, 2 Camp. 537.

(*k*) Smith *v.* Janes, 20 Wend. 192; Rickford *v.* Ridge, 2 Camp. 537; Beeching *v.* Gower, Holt, N. P. 313; Clark *v.* Stackhouse, 2 Mart. La. 327; Morrison *v.* Bailey, 5 Ohio State, 13. In Merchants' Bank *v.* Spicer, 6 Wend. 443, *Marcy*, J. hints at this distinction, but he repudiates it at the beginning of his opinion, and lays down the general rule: "Checks are considered as having the character of inland bills of exchange, and the holder, if he would preserve his right to resort to the drawers and indorsers, must use the same diligence in presenting them for payment, and in giving notice of the default of the drawee, that would be required of him as the holder of an inland bill." Gough *v.* Staats, 13 Wend. 549; Harker *v.* Anderson, 21 Wend. 378. This is also adopted by Chancellor Kent. 3 Kent, Com. 87. See Kemble *v.* Mills, 1 Man. & G. 757; Robinson *v.* Hawksford, 9 Q. B. 52. The ground taken by Mogadara *v.* Holt, 1 Show. 317, 12 Mod. 15, was that the drawer was liable at any distance of time, and the *onus* rests upon him to show that loss or damage has accrued. See Sarsefield *v.* Witherly, Comb. 152. It is sometimes asked, "Why should not the same rule apply to the drawer of a bill of exchange?" Bayley on Bills (1836), p 229, note *o*; Harker *v.* Anderson, 21 Wend. 372. We should say, in answer, that checks and bills of exchange are not the same, as we have attempted to show; and therefore the query has no application. And in particular the drawer of the check seems to be always regarded as the principal debtor: the drawer of a bill is sometimes the surety merely. Morrison *v.* Bailey, 5 Ohio State, 13; Daniels *v.* Kyle, 1 Ga. 304. See cases in former notes, and Conroy *v.* Warren, 3 Johns. Cas. 259; Murray *v.* Judah, 6 Cowen, 484; Eichelberger *v.* Finley, 7 Harris & J. 381; Franklin *v.* Vanderpool, 1 Hall, 78. Checks are drawn against funds deposited; bills of exchange rest upon commercial arrangements of various kinds; and when the drawer settles with the drawee of a bill of exchange, he presumes that the balance is made with reference to all the transactions of all kinds. Morrison *v.* Bailey, 5 Ohio State, 13. But a check is rather an appropriation of so much money, which the drawer has no further right to use or meddle with, or if he does, he is liable to account for it in a reasonable time, though not at any distance of time. When Mogadara *v.* Holt was cited to *Abbott*, C. J., Hill *v.* Heap, Dow. & R., N. P. 57, 59, (1823,) he said that the doctrine was *now* exploded, for, until the contrary was shown, the drawer was presumed to have funds in the drawee's hands. Thurman *v.* Van Brunt, 19 Barb. 409; White *v.* Ambler, 4 Seld. 170. A drawer is supposed to stand, *de jure*, in the place of a guarantor Little *v.* Phenix Bank, 2 Hill, 425. The *onus* of showing that he has suffered no injury seems to rest on the holder. Id.; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, id. 259; Hoyt *v.* Seeley, 18 Conn. 353; Daniels *v.* Kyle, 1 Ga. 304, 5 Ga. 245. But insolvency of the drawee is almost the only case in which the drawer is a loser, so that he is discharged on

tween the holder and the drawer, it seems also to be settled, although not without some dissent, that the drawer is not discharged by any delay of presentment whatever, unless he can show that he has been injured thereby, as by a failure of the drawee, or a change in the state of accounts, or otherwise.(*l*) The authorities, however, are not quite in agreement as to this distinction between the drawer and indorser. It is quite common in this country to present a check, not for payment, but to be marked and certified as good, (which is usually done by the cashier on whom it is drawn writing upon it "Good," over his signature,) and then it circulates or is transmitted as cash. Checks are often certified as good in England, as well as here, and are there used and deposited as bills of the certifying bank. This marking or certifying is called in some cases "acceptance," and is said to have the same effect as acceptance. It seems to be determined that such certifying creates an immediate and positive engagement of the bank to pay the check.(*m*) The

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a check. Harbeck *v.* Craft, 4 Duer, 122. The presumption that a drawee of a check, when he has accepted, has funds, is so strong, that, if the drawer is obliged to take up the check, he may maintain an action against the drawee on that presumption. Thurman *v.* Van Brunt, 19 Barb. 409. In Pack *v.* Thomas, 13 Smedes & M. 11, the drawer of the check was injured; but it was held that he was released on his check only to the extent of his injury from want of actual notice. He is not released, it is said, by want of notice, although he has the funds on deposit. Daniels *v.* Kyle, 1 Ga. 304; Little *v.* Phenix Bank, 7 Hill, 359. In Laws *v.* Rand, 3 C. B., N. S. 442, it was held, in accordance with Robinson *v.* Hawksford, 9 Q. B. 52, that no time less than six years was an unreasonable time to present a check, unless some loss accrued meanwhile to the drawee. See Conroy *v.* Warren, 3 Johns. Cas. 259, in which there was delay and no loss; and a very similar case, where there was a loss, is Little *v.* Phenix Bank, 2 Hill, 425; Elting *v.* Brinkerhoff, 2 Hall, 459.

(*l*) Alexander *v.* Burchfield, 3 Scott, N. R. 555, 7 Man. & G. 1061; Serle *v.* Norton, 2 Moody & R. 401; Robinson *v.* Hawksford, 9 Q. B. 52; Foster *v.* Paulk, 41 Maine, 425; Morrison *v.* Bailey, 5 Ohio State, 13; In re Brown, 2 Story, 502; Tryon *v.* Oxley, 3 Iowa, 289; Smith *v.* Janes, 20 Wend. 192; East River Bank *v.* Gedney, 4 E. D. Smith, 582; Pack *v.* Thomas, 13 Smedes & M. 11; Flemming *v.* Denny, 2 Phila. R. 111, 13 Leg. Intelligencer, 140; Shrieve *v.* Duckham, 1 Littell, 194; Daniels *v.* Kyle, 1 Ga. 304, 5 Ga. 245; Little *v.* Phenix Bank, 2 Hill, 425; Murray *v.* Judah, 6 Cowen, 484; Harbeck *v.* Craft, 4 Duer, 122. This rule of presentment was stated in a recent case in the Queen's Bench to be, that, "as between the drawer of a check and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemed unreasonable; but if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years." Per *Patteson*, J., in Alexander *v.* Burchfield, 3 Scott, N. R. 555, 7 Man. & G. 1061; and see Laws *v.* Rand, 3 C. B., N. S. 442.

(*m*) Robson *v.* Bennett, 2 Taunt. 388; Barnet *v.* Smith, 10 Foster, 256; Willis *v.*

bank becomes so far the primary debtor, that no delay in presenting — at least, not a delay for a year or more — would affect the obligation of the bank.(*n*) The law of demand and notice has no application between the bank and the holder; but may still have as between the holder and drawer. As to the authority of a teller or cashier of a bank to certify checks in this way, it cannot be derived from his general power or duty, or from the nature of his office.(*o*) But it is certain that the bank may, by vote, confer this power upon an officer. And even if they con-

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Phœnix Bank, 2 Duer, 121; and see In re Brown, 2 Story, 502. By the practice of the London bankers, if one banker who holds a check drawn on another banker presents it after four o'clock, it is not then paid; but a *mark* is put on it, to show that the drawer has effects, and that it will be paid; and this marking binds the banker to pay on the next day at the clearing-house. Robson *v.* Bennett, 2 Taunt. 388.

(*n*) Farm. & Mech. Bank *v.* Butchers & Drovers' Bank, 4 Duer, 219, 14 N. Y. 623, 16 id. 125. In Willets *v.* Phœnix Bank, 2 Duer, 121, it was decided that the neglect to demand payment of a certified check for two months after the time of certifying, the drawer having in the mean while drawn all his funds out of the bank, did not constitute a valid defence for the bank in a suit on the check. *Oakley*, C. J. said: "The question in this case evidently depends upon the construction to be given to the act of the proper officer of a bank in certifying a check. Is it a mere declaration of an existing fact? or does it create a new and binding obligation on the part of the bank? Is it simply a declaration that the maker had then funds in the bank corresponding with the amount of the check? or is it an appropriation of those funds to the credit of the check, and a promise that, upon demand, they shall be applied to its payment? If the former, the defendants are not liable; if the latter, they have no defence. That the latter is the true legal interpretation of a certified check we cannot doubt; since, upon any other construction, the act of certifying would be nugatory, or would operate as a fraud. It would be nugatory, if understood by all as creating no obligation on the part of the bank to retain funds to meet the payment of the check. It would operate as a fraud, if generally understood as creating an obligation which the law would hold not to exist. The sole and manifest object of the maker or holder of a check in requiring it to be certified is to enable him to use it as money; that is, to pass it to others with the same certainty of its acceptance, as affording the same security to a holder; and the bank, in complying with the request, must know that such is its object. It is, therefore, certain that a bank, by certifying a check, means to give it a currency and value that would not otherwise belong to it, and this additional value, it seems to us, can only be given by interpreting the certificate as an unconditional promise of payment, whenever payment shall be demanded; otherwise a certified check would be of no more use or value than an ordinary check, and would afford no greater security to a holder. The certificate is a useless form, unless it means, not merely that the check was good when certified, but that it will be good when presented for payment. This construction is, therefore, necessary to give effect to the apparent intention of the parties; and at any rate is necessary to prevent the check from being subsequently used as a means of deception and fraud." In Barnet *v.* Smith, 10 Foster, 256, a statement by the cashier, that a check on the bank was good, was held to amount to an acceptance.

(*o*) Mussey *v.* Eagle Bank, 9 Met. 306.

fer it with limitations, as a thing to be done only when actually in funds, still, if the officer use this power collusively with a customer, and in fraud of the bank, the bank is held in favor of one who in good faith takes such certified paper for value.(*p*)

In one case it is held that a usage on the part of the cashier to certify checks, however clear or however proved, would be a bad usage, and would not bind the bank.(*q*) But in that case

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(*p*) In Farmers & Mech. Bank of Kent Co. *v.* Butchers & Drovers' Bank, 4 Duer, 219, 14 N. Y. 623, 16 id. 125, it was held that a *bona fide* holder for value, of a check certified by the paying teller of the bank on which it is drawn, whose authority was limited to cases where the drawer had funds to meet the check, might recover of the bank; although there were no funds of the drawer in the bank, and the check was certified by the teller in violation of his duty and for the accommodation of the drawer.

(*q*) Mussey *v.* Eagle Bank, 9 Met. 306. The court remarked, that "if a usage had been proved of the certifying by the teller that the check is good, to enable a holder to use it afterwards at his pleasure, we are clearly of opinion that such a usage would be bad, and could not be upheld. It would give to bank-checks, which are intended for immediate use, and are the substitutes for specie in the ordinary transactions of business, the character of bills of exchange, payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security; it would substitute checks for cash in the hands of tellers who receive them, and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name, a power never contemplated by the legislature, nor intended to be conferred by the stockholders. It would expose the teller to the frauds of a bookkeeper, and both of them to the temptations of unprincipled and greedy men, who might, under various pretences, procure their checks to be thus certified, in the first instances, when their deposits were good, and afterwards when there was no balance to their credit; allowing interest, as a bonus for the certificate, to the certifying officer, who would afterwards receive such checks as cash. And the present case well illustrates the hazards and the evils to which banking companies and their officers are exposed by the allowance of such a practice. It has been pressed in the argument on the subject of usage, that this certificate of 'good' on the check is but another form of the exercise of a usage so common in banks, to grant by the teller a certificate of deposit of money to the credit of a third person. But we are of opinion, with the judge before whom the trial was held, that usage of the one will not support the practice of the other. The two practices, while having the appearance of resemblance, and although one may be used for the same purpose as the other in the form of a remittance, are in their character essentially distinct. A certificate of deposit is regularly issued only when money is actually paid into a bank for the benefit of a third person, and is placed to his credit; by means of which certificate, and on the return thereof, he can draw for the money deposited; or, if the money is not actually deposited, but the check of the party procuring the certificate is given, such check is immediately charged to the account of the drawer. This is a transaction in which money is actually paid for the certificate, and the certificate is no more than entering the amount in the depositor's bank-book. The difference is, that the credit is given to the correspondent of the depositor, and not to the depositor himself. But where a check is certified, as in the case at bar, no money is deposited, no check is received, and the teller can only rely on the declaration of the bookkeeper that the check is good. The trans-

no such usage was proved, and the remark was therefore *obiter*, and it is difficult to see why the express authority of the directors should bind them, and not a usage of the cashier, perfectly well known to them, and fully confirmed and sanctioned by their continued acquiescence. If a bank is induced to certify a check through the fraudulent representations of the drawer, it may reclaim or countermand the payment of the check or the money represented by it, unless the check had been previously paid to a *bona fide* creditor of the drawer, without notice on his part of the fraud by which it was procured.(*r*) Banks are in the habit, as it seems, of paying checks sometimes when not in funds. This of course is in the case of old and well-known customers, whose credit is good, and the bank would not willingly injure it. It would seem that if a check is sent to a bank when no funds are placed there to meet it, it may well raise an implied assumpsit on the part of the drawer; but some of the cases think the bank unauthorized to make such payment, and hold that there is no claim derived therefrom against the drawer, and no usage could well affect it, for it would be a bad usage.(*s*) It may be inferred from all the cases that the drawer is not generally liable until after demand on the drawee and refusal, and is in this respect regarded only as a surety of the drawee; but if he drew without a right to draw either from funds or from a bargain or other reasonable ground, he is then liable at once, without any presentment or demand.(*t*)

If drawer and holder both keep their accounts at the same bank, and the cashier receive the check and hold it, this does not bind the drawee to pay it, because the bank has the right to receive it as agent of the holder, and to examine whether the bank has funds of the drawer before it pays the check.(*u*) Where a

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action enters not into the books of the bank, is not necessarily known by its higher officers; and yet, it is contended, the bank is bound by the transaction."

(*r*) Bank of the Republic *v.* Baxter, 31 Vt. 101.

(*s*) Lancaster Bank *v.* Woodward, 18 Penn. State, 357. In England, where one got a check cashed, knowing the bankruptcy of the drawer, and that he held no funds, the bankers were allowed to recover back. Martin *v.* Morgan, Gow, 123.

(*t*) *Supra*, p. 71, note *e*.

(*u*) A banker of both the holder and drawer will be presumed, if he take the check of the latter from the former, to receive it as the former's agent; and no promise to pay it will be implied if he keep it till the following day. Boyd *v.* Emmerson, 2 A. & E. 184, 4 Nev. & M. 99; Kilsby *v.* Williams, 5 B. & Ald. 815; 1 Dow & R. 476. In

bank carries on business by means of branches established at different places, each branch transacting business as a separate bank, having its own customers and giving out distinct check-books, headed with the name of the place, if one branch cashes a check drawn on another, the branch so paying it will not be considered as honoring the check, or as purchasing it, but as taking it on the credit of the holder.(*v*) If two or more checks of the same drawer are presented at a bank, it is said that that which is first drawn has no claim over the others. If the bank has funds to pay the check, or all checks presented, it must pay them, although the bank or its paying officer may know that other checks have been drawn, which, when presented, will go beyond the funds. But if all the checks presented at once go beyond the funds, it seems that the bank is under no obligation to pay any of them, and certainly it is not bound to divide the funds among all of them.(*w*) But if the bank choose to pay the first in date, it would be difficult to see on what ground either the drawer or the holders of the others could complain. It might be otherwise if the bank selected and paid a check of later date, but even this is doubtful. A bank is not bound to pay a part of a check when it has not funds for the whole; nor is the holder bound to receive a part if it be tendered to him.(*x*) But if the bank saw fit to pay to the holder all the funds it had, although less than the amount of the check, the drawer should not be permitted to object that he had knowingly overdrawn and

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the last case, it was held, that any money paid into the banking-house by the drawer, while the banker holds the check, must be applied to the draft, although the drawer is indebted by a large balance to the banker.

(*v*) Woodland *v.* Fear, 7 Ellis & B. 519.

(*w*) Dykers *v.* Leather Manuf. Bank, 11 Paige, 612.

(*x*) In re Brown, 2 Story, 502, 516, *per Curiam:* "Now, the bank is not bound to pay unless it is in full funds; and it is not obliged to pay, or accept to pay, if it has partial funds only, for it is entitled to the possession of the check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with unless he receives full payment, nor the bank exact, unless under like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part; for he has a claim to the entirety." The partial failure of funds is regarded as an entire failure of funds, so far as notice to the drawer is concerned. But a deposit of depreciated bank-notes has been held to entitle a drawer to due diligence on the part of the holder in presenting a check to the drawee. St. John *v.* Homans, 8 Misso. 382.

did not expect payment, or that he had drawn expecting payment of the whole amount of the check, and was injured by payment of all the funds he had there. Suppose a holder should learn before presentment of a large check, that the funds would fall short, and that the check would not be paid, and he should thereupon make a deposit of the deficiency to the credit of the drawer, and then, presenting his check, should be paid the whole amount by the bank, we are not sure that the drawer could complain either of the payee or of the bank.

A check payable on demand may be said to be always overdue, in one respect. One who takes it some time after it is dated is said to acquire no better title than his transferrer had. This, however, must be true only where so much time has elapsed as properly to put the receiver of it on his guard; for if he takes it without either fraud or negligence, and presents it and receives the money, he should be permitted to hold it. But as checks are seldom made, or rightfully used, for circulation, a few days' delay would charge the taker with negligence; and whether the taker exercised reasonable caution seems to be a question of fact for the jury. For some purposes, it is clear that a check is overdue only when it has been demanded and payment refused.(*y*) So far as relates to the liability of the drawer, who is not injured by the failure of the bank, and has not suffered any damage from delay, there seems to be no uncertainty. The question is, how far the equities of the original parties will be let in against subsequent transferees who take a check long after it is payable. Doubtless, a subsequent transferee is bound to present the check as early as the first holder should have presented it, so far as the risk of the solvency of the drawee is concerned, because checks not being intended for circulation, the drawer is entitled to the same early presentment, without any reference to the party whose duty it may be to make the presentment.(*z*) If a banker pays a check which

(*y*) See same topic treated *supra*, Vol. I. p. 271, with cases cited. And see, for the law generally on these points, Rothschild *v.* Corney, 9 B. & C. 388; Brooks *v.* Mitchell, 9 M. & W. 15; Boehm *v.* Sterling, 7 T. R. 423, 429; Down *v.* Halling, 4 B. & C. 330; Serrell *v.* Derbyshire, &c. Railway Co., 9 C. B. 811; Bank of Bengal *v.* Fagan, 7 Moore, P. C. 72; Willets *v.* Phœnix Bank, 2 Duer, 121; Anderson *v.* Busteed, 5 Duer, 485.

(*z*) Boehm *v.* Sterling, 7 T. R. 423. Muilman lent his acceptance to the defendant, receiving the latter's check, dated Feb. 1796, on 20th January, 1797. Muilman passed

was cancelled, and the cancelling remains, or a check which had been torn to pieces and then pasted together, or one which is so long overdue as to be stale, or otherwise justifying suspicion and inquiry, he pays it at his own peril. And although it may have been rightfully drawn, the drawer, if he had actually cancelled or recalled it, may recover the funds from the bank.(*a*)

On the other hand, if it was the negligence of the drawer which led to the payment, or if he was the cause of the belief of the drawee that such a check, or even a forged or altered check, was valid and payable, and such a check is paid in good faith, the drawer loses it. And generally, a drawer of a check, who, by fault of any kind, enables a third person to defraud a banker by means of the check, must lose the amount paid by the banker.(*b*) If a bank pays a forged check, without some such excuse as above suggested, of course it cannot charge the payment to the drawer.(*c*) And if the check be only altered by the forgery, the drawer is still liable for the original amount, and no more.(*d*) It is equally obvious that it can reclaim the money from the payee, if the payee were in fault. But a more difficult question arises where a bank pays a forged check to an innocent holder.(*e*) The cases on this subject are few and inde-

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the plaintiff the check, and the defendant was obliged to take up the acceptance. The defence was, that the check was stale when passed. Lord Kenyon left the question of *bona fides* to the jury, who found for the plaintiff. Lord Kenyon held afterwards, that, when a bill was taken after it was due, it was subject to the equities, and that checks were upon the same footing. But in the case at bar the defendant could not object, as *he* had issued it nine months after date.

(*a*) Scholey *v.* Ramsbottom, 2 Camp. 485. In this case a check had been torn in pieces by the drawer and thrown aside; these pieces were pasted together on another slip of paper, the rents, however, being quite visible, and the face of the check soiled and dirty. This check was presented by a stranger, and paid without inquiry; and the bank was held liable for the amount to the drawer, the condition of the instrument being sufficient notice of cancellation.

(*b*) Lickbarrow *v.* Mason, 2 T. R. 63; Young *v.* Grote, 4 Bing. 253.

(*c*) Orr *v.* Union Bank, 1 Macq. H. L. Cas. 513, 29 Eng. L. & Eq. 1; Hall *v.* Fuller, 5 B. & C. 750; Johnson *v.* Windle, 3 Bing. N. C. 225; Young *v.* Grote, 4 Bing. 253; Morgan *v.* Bank of N. Y., 1 Kern. 404; Coggill *v.* Am. Exch. Bank, 1 Comst. 113.

(*d*) Hall *v.* Fuller, 5 B. & C. 750, 8 Dow. & R. 464; Smith *v.* Mercer, 6 Taunt. 76; Robarts *v.* Tucker, 16 Q. B. 560.

(*e*) It has been held, that money paid a *bona fide* innocent holder on a forged check cannot be recovered by the bank. Burlington County Bank *v.* Miller, Legal Intelligencer, Phila., Feb. 8, 1856; Goddard *v.* Merchants' Bank, 4 Comst. 147; Bank of Commerce *v.* Union Bank, 3 id. 230. We think this in accordance with the decisions

cisive; but we think the law must be this: the bank can recover it from the payee, if the payee were in fault, or if an innocent payee will then be in no worse condition than if the bank had refused to pay it. Still the bank, rather than the holder, is bound to know whether the signature be genuine; and if by any change of accounts, by any consideration paid which might have been recovered had payment been refused, but cannot be recovered now, or by any loss of opportunities to get security or indemnity from the transferrer which the holder would have had but for the payment to him, the payee cannot be replaced in as good a position after he returns the money to the bank, then we say he is not bound to return it. Perhaps injury to the payee, by the demand of repayment, would be so far presumed, as matter of law, as to cast upon the bank the burden of proof.

Where a check payable to order is paid by the bank on a forged indorsement of the payee's name, the bank is liable for the amount to the drawer, if the check had not passed into the hands of the payee, and is liable to the payee, if it was then his property. The burden of proving such indorsement genuine rests with the bank.(*f*).

A bank should not pay a check after notice that it was lost; nor before it is due, if on time; (*g*) nor after notice of

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which hold a drawee bound to know his drawer's signature. Price *v.* Neal, 3 Burr. 1354; *Buller*, J., Smith *v.* Chester, 1 T. R 654. See also Cocks *v.* Masterman, 9 B. & C. 902; Smith *v.* Mercer, 6 Taunt. 76.

(*f*) Morgan *v.* Bank of the State of N. Y., 1 Duer, 434, 1 Kern. 404; Robarts *v.* Tucker, 16 Q. B. 560; Smith *v.* Mechanics & Traders' Bank, 6 La. Ann. 610 In England, it is now provided by statute, — 16 & 17 Vict. ch. 59, § 19, — that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof." Notwithstanding this statute, the banker is not relieved of responsibility, if he pays such a check when the drawer had no funds in his hands. Grant on Banking, p. 27. And it is probable that, if the payee were a customer of the banker's, the handwriting of the payee should be presumed to be known to the banker, and he would be liable for a payment made on a forged indorsement. Id. 28.

(*g*) Godin *v.* Bank of Commonwealth, 6 Duer, 76; De Silva *v.* Fuller, Sittings at London, Easter, 1776, Sel. Cas. 238, Ms. Chitty. 260.

insolvency; (*h*) nor after the death of the drawer; but if the bank pays a check after the death, and before notice of the death, it is said to be a good payment.(*i*) A banker must pay a check at once, if he has funds, or as soon as he can conveniently ascertain that he has funds; and it has even been said that if he fails to do this, the drawer may have an action of *tort* against the banker for the refusal, without proving specific injury; but this question of the liability of the bank we have already sufficiently considered.

If the deposit is by many, who are not partners, the banker should pay only to the signature of all the depositors.(*j*) If, however, one or more of the depositors abscond, equity will relieve the others.(*k*) One of several executors or administrators may draw a check for funds deposited in bank in the names of all of them, as each has entire control of the whole property of the estate, and the act of one is generally deemed the act of all; and the payment of such a check is a discharge of the bank, unless it has been countermanded by a co-executor or administrator.(*l*)

(*h*) Ex parte Sharp, 3 Mont. D. & D. 490; Vernon *v.* Hankey, 2 T. R. 113; Ex parte Bowness, 2 Maule & S. 479, 2 Rose, 266; and see Udal *v.* Walton, 14 M. & W. 254. In Hammersley *v.* Purling, 3 Ves. 757, it was so held, though banker had no notice of his customer's insolvency. The assignee of the bankrupt has no remedy against the person to whom the bank has paid the check after the drawer's bankruptcy, unless such person had knowledge of the act of bankruptcy. His only remedy is against the bank which paid, with notice of the bankruptcy. Mathew *v.* Sherwell, 2 Taunt. 439, 1 Rose, 118.

(*i*) Tate *v.* Hilbert, 2 Ves. Jr. 118.

(*j*) In Stone *v.* Marsh, Ryan & M. 364, the court said: "If two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw." In Innes *v.* Stephenson, 1 Moody & R. 145, Lord *Tenterden* said: "That the case was a very clear one that money was paid to bankers by three persons not partners in trade; that it had been stated that one of them could draw checks so as to bind the others; but that was not law, and to allow it would defeat the very object of paying the money in jointly, and it must be well known to the jury that it was not the practice unless the persons drawing stood in the relation of partners." Dixon's case, 2 Lewin, Cr. Cas. 178; Sloman *v.* Bank of England, 14 Sim. 475, 9 Jurist, 243, pronounced the opposite doctrine "absolute nonsense." This was an attempt on the part of the Bank of England to break down the rule. See also Wallace *v.* Kelsall, 7 M. & W. 264; Husband *v.* Davis, 10 Cons. B. 645; Can *v.* Read, 3 Atk. 695; Smith *v.* Jamesons, 1 Esp. 114. The same principle applies to joint bailors. May *v.* Harvey, 13 East, 197; Regina *v.* Turpin, 2 Car. & K. 820.

(*k*) Ex parte Hunter, 2 Rose, 382; Ex parte Collins, 2 Cox, 427; and see Sloman *v.* Bank of England, 14 Sim. 475; Shortbridge's case, 12 Ves. 28.

(*l*) Shep. Touchst. 484; Gaunt *v.* Taylor, 2 Hare, 413; Ex parte Rigby, 19 Ves.

A check paid and held by the banker is no evidence whatever of a loan of money by the drawee to the drawer, for the plain reason that in the vast majority of cases such payment was only a return of funds previously deposited by the drawer.(*m*) But if it is made to appear that the check was accepted without funds, an implied promise is raised that the drawer will put the drawee in funds.(*n*) But this inference or presumption may be rebutted.(*o*)

As between the drawer and other parties this question is more difficult. If one holds a check which is unpaid, and has not been presented for payment, it seems to be clear that this cannot be used as evidence of any indebtedness from the drawer to the payee; and we should say this would be true, if payable to the holder expressly by his name.(*p*)

If a check be payable to a person by name, it seems that the mere payment of the check is not proof that the person named received the money, unless the check bear his indorsement, which should always be required; (*q*) but it may perhaps be doubted if a bank have a strict right to require an indorsement, unless the check be drawn payable to the payee or order.

On the other hand, if a note is made payable to some one or order, the possession of it by the drawer with the name indorsed, or any proof by him that the bank had paid it to that payee personally, and charged the payment to the drawer, would have all the effect of any other written receipt of money signed by the

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462; Can *v.* Read, 3 Atk. 695; Pond *v.* Underwood, 2 Ld. Raym. 1210; Allen *v.* Dundas, 3 T. R. 125; Clough *v.* Bond, 3 Mylne & C. 490.

(*m*) Healy *v.* Gilman, 1 Bosw. 235; Thurman *v.* Van Brunt, 19 Barb. 409; Lancaster Bank *v.* Woodward, 18 Penn. State, 361; Fletcher *v.* Manning, 12 M. & W. 571.

(*n*) Fletcher *v.* Manning, 12 M. & W. 571; Thurman *v.* Van Brunt, 19 Barb. 409.

(*o*) Thurman *v.* Van Brunt, 19 Barb. 409.

(*p*) Pearce *v.* Davis, 1 Moody & R. 365; Flemming *v.* M'Clain, 13 Penn. State, 177.

(*q*) Egg *v.* Barnett, 3 Esp. 196; Patton *v.* Ash, 7 S. & R. 116; Mountford *v.* Harper, 16 M. & W. 825, 16 Law J. Exch. 184; Cromwell *v.* Lovett, 1 Hall, 56; Pearce *v.* Davis, 1 Moody & R. 365; People *v.* Howell, 4 Johns. 296; Lloyd *v.* Sandilands, Gow, 13; People *v.* Baker, 20 Wend. 602; Boswell *v.* Smith, 5 C. & P. 60; Thompson *v.* Pitman, 1 Fost. & F. N. P. 339. An order by an incorporated company on its own treasurer is certainly an evidence of indebtedness; but it must be presented. Marion & M. R. R. Co. *v.* Hodge, 9 Ind. 163. But a draft by the postmaster-general on a deputy is no evidence of debt from the drawee to payee, unless accepted. Goodwin *v.* Hazzard, 1 Smith, Ind. 320.

payee, but no more.(*r*) And whether the question was one of demand, or defence, or set-off, we should say it would not of itself be evidence as to the cause of payment, or the account on which it was paid, although it might be made so by other evidence or circumstances connecting it with a previous account or debt. A cancelled check in the hands of the bank upon which it is drawn is evidence of payment of it by the bank.(*s*)

The natural inference from the giving a check is, that it was given in payment of a debt due the payee from the drawer; and in order to charge the payee as a debtor to the drawer, it must be shown that the check was in fact loaned to the payee.(*t*) A check drawn in favor of one who had lent money to the drawer, on a bank where the drawer was known to have no funds, and which was not expected by him to be presented to the bank, is evidence of money borrowed by the drawer.(*u*) On proof of money lent by the drawer to the payee, the check, when paid, may be given in evidence of the amount of the loan.(*v*) It may be added, that the bearer may sue upon a check, as upon an inland bill of exchange.(*w*) And a lost check may be recovered in like manner as a lost note.(*x*) So if it be destroyed.(*y*)

There are also rules in England, founded on custom, which are not yet law in this country; at least, no further than they might be so held on general grounds,—that is to say, the custom is not established in this country. Thus, by usage of trade in London, it seems that a banker will not render himself liable on a check if he return it any time before five o'clock on the day he receives it, and although the check had been cancelled by mistake.

(*r*) Thompson *v.* Pitman, 1 Fost. & F., N. P. 339; Burton *v.* Payne, 2 Car. & P. 520; Egg *v.* Barnett, 3 Esp. 196.

(*s*) Conway *v.* Case, 22 Ill. 127.

(*t*) Graham *v.* Cox, 2 Car. & K. 702; Thompson *v.* Pitman, 1 Fost. & F., N. P. 339; Aubert *v.* Walsh, 4 Taunt. 293; Lloyd *v.* Sandilands, Gow, 13; Cary *v.* Gerrish, 4 Esp. 9; Patton *v.* Ash, 7 S. & R. 116.

(*u*) Cushing *v.* Gore, 15 Mass. 69.

(*v*) Healy *v.* Gilman, 1 Bosw. 235.

(*w*) Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, id. 259; Woods *v.* Schroeder, 4 Har. & J. 276; Boehm *v.* Sterling, 7 T. R. 423. See also In re Brown, 2 Story, 502; Foster *v.* Paulk, 41 Maine, 425; Mauran *v.* Lamb, 7 Cowen, 174.

(*x*) Bevan *v.* Hill, 2 Camp. 381.

(*y*) Pierson *v.* Hutchinson, 2 Camp. 211; Wain *v.* Bailey, 2 Perry & D. 507

No doubt, here as well as there a banker would have a reasonable time to ascertain whether he was in funds to meet a check.(*z*) So if a banker receive a check from a customer, to hold an indorser still liable it must be presented by the next day, as we have seen. But as between him and his customer it may be his duty to present it earlier, or waiting longer may be excused.(*a*) And to hold a drawer in case of insolvency of the banker, the check must be presented the next day after receipt, or if the parties live in different towns, it must be forwarded on the next day; but an agent of a bank, or a branch thereof, is not allowed to keep the check one day before forwarding the same to the principal bank, and then the principal bank to keep it one day before forwarding it to the drawee.(*b*) It must not be kept till the third day, though it then reaches the drawee as early as it would by the regular post of the second day.(*c*)

Checks have been held in England to be a legal tender, if not objected to, in the same way as bank-notes.(*d*) How far checks may be considered as payment will be somewhat treated of in the chapter on Payment by Bill or Note. It is undoubtedly payment as soon as it is cashed. But, generally at least, not until then; and therefore a holder of a note or bill is not obliged to give it up on receipt of a check until the check is paid.(*e*) And neither in England nor in this country do bankers usually receive checks in payment of the paper they hold. But if a creditor for any debt receive for it a check which is dishonored, his original rights and remedies are unaffected by the check.(*f*) And even presentment at the bank and accept-

(*z*) See Fernandey *v.* Glynn, 1 Camp. 426, note.

(*a*) Boddington *v.* Schlencker, 4 B. & Ad. 752, 1 Nev. & M. 540; Alexander *v.* Burchfield, 1 Car. & M. 75, 3 Scott, N. R. 555, 7 Man. & G. 1067.

(*b*) Rickford *v.* Ridge, 2 Camp. 537; Moule *v.* Brown, 4 Bing. N. C. 266, 5 Scott, 694.

(*c*) Beeching *v.* Gower, Holt, N. P. 313.

(*d*) Per *Buller*, Wilby *v.* Warren, Tidd's Prac., 9th ed., 187, note. So Jones *v.* Arthur, 8 Dow. Prac. Cas. 442, 4 Jur. 859. *Vide* Ex parte Cunliffe, De Gex, 408.

(*e*) Pearce *v.* Davis, 1 Moody & R. 365; The People *v.* Baker, 20 Wend. 602; Taylor *v.* Wilson, 11 Met. 44; Moore *v.* Barthrop, 1 B. & C. 5, 2 D. & R. 25; Hough *v.* May, 2 Har. & W. 33, 4 A. & E. 954; Barnet *v.* Smith, 10 Foster, 256; Hansard *v.* Robinson, 7 B. & C. 90; Ward *v.* Evans, 12 Mod. 521; Vernon *v.* Boverie, 2 Show. 296.

(*f*) Brown *v.* Kewley, 2 B. & P. 518; Everett *v.* Collins, 2 Camp. 515; Stedman

ance there has been held to be no payment.(*g*) More evidence is required to show that a check given to take up a note is received in satisfaction and discharge, than is demanded where one note is given for another.(*h*) We think it may well be doubted whether a check may be considered as payment, even in Maine, Vermont, and Massachusetts.(*i*) A drawer of a check

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v. Gooch, 1 Esp. 3; Dent *v.* Dunn, 3 Camp. 296; Marsh *v.* Pedder, Holt, N. P. 72, 4 Camp. 257; Barnet *v.* Smith, 10 Foster, 256; Tapley *v.* Martens, 8 T. R. 451; Taylor *v.* Wilson, 11 Met. 44; Wyatt *v.* Marquis of Hertford, 3 East, 147; Ex parte Blackburne, per Lord *Eldon*, 10 Ves. 204. In Dennie *v.* Hart, 2 Pick. 204, A, being summoned as trustee of B, disclosed a general assignment to himself from B, in trust to pay debts due to himself and others, and to pay over the surplus to B; that, being told the plaintiff intended to summon him, he gave a bank-check to B for the probable surplus, without any understanding that it should not be presented for payment, but that it was not presented; that afterwards, B being about to be absent from the State, A suggested that it should be left to pay debts not provided for. It was accordingly put into the hands of A's clerk, with whom it still remained. Held, the giving of the check was not a payment of the surplus, A having still the control of it.

(*g*) Barnet *v.* Smith, 10 Foster, 256.

(*h*) Olcott *v.* Rathbone, 5 Wend. 490; and see Hawley *v.* Foote, 19 Wend. 516. Even if agreed upon as payment, the want of funds, and knowledge of such want of funds, would be, probably, such a fraud as would render the bargain no protection to the drawer, though this might be otherwise with a transferrer not the drawer.

(*i*) As a matter of fact, this seems not to be the intention of the parties. If a check were taken from the maker of a note, are the indorsers to be held discharged? "If the paper accepted is not binding upon all the parties previously liable, the presumption of payments may be considered as rebutted" Fowler *v.* Ludwig, 34 Maine, 455. See Payment by Bill or Note. See Cushing *v.* Gore, 15 Mass. 74. In Dennie *v.* Hart, 2 Pick. 204, it was resolved that giving the check was no payment in that case, which was, however, somewhat peculiar. When an order is unaccepted and non-negotiable, it is no payment, although receipted for as such. In Taylor *v.* Wilson, 11 Met. 44, 51, the court, on this point, said: "A check is merely evidence of a debt due from the drawer; whether it shall operate as payment or not, depends on two facts: *first*, that the drawer has funds to his credit in the bank upon which it is drawn; and, *second*, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered. But if the party receiving it is guilty of laches in presenting it, or in giving notice of non-payment after presentment, and the bank in the mean time suspends payment, he thereby makes it his own, and it shall operate as payment of his debt, the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them." See The Eastern Star, Ware, 184. In Ocean Tow Boat Co. *v.* Ship Ophelia, 11 La. Ann. 28, the plaintiff was directed to an agent to receive his pay. The agent took a receipt and gave him *his* check. This was not held to operate as a payment, although, as it appears (see chap. Payment), a note given and a receipt taken together operate a novation in Louisiana. But Mr. Chitty, ed. 1833, ch 9, pp. 433, 434, says: "If a creditor, on any other account than a bill of exchange, is offered cash in payment of his debt, or a check upon a banker from an agent of his debtor, and prefer

without funds may be sued at once, without presentment, demand, or notice.(*j*)

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the latter, this does not discharge the debtor, if the check is dishonored, although the agent fails with a balance on his hands to a much greater amount." We doubt whether this be *law*. But see Everett *v.* Collins, 2 Camp. 515. In Louisiana, a debt is not novated by taking a check on a bank. Bordelon *v.* Weymouth, 14 La. Ann. 93, though it may be so by clear agreement, or be, by like agreement, novated in place of a note; Helme *v.* Middleton, id. 484. In Puckford *v.* Maxwell, 6 T. R. 52, one who was arrested gave a draft, which was dishonored, and another arrest on the same affidavit was held good. Sometimes a check is mere evidence of an amount due, as in Devoe *v.* Moffat, Anthon. 161. In this case presentment was not contemplated by the parties.

(*j*) True *v.* Thomas, 16 Maine, 36; Cromwell *v.* Lovett, 1 Hall, 56, 6 Wend. 369.

CHAPTER IV.

BANK-NOTES.

BANK-NOTES, or, as they are quite commonly but less accurately called in this country, bank-bills, are, in their form, only the promissory notes of a bank, payable on demand to bearer, and therefore negotiable by delivery. Like other promissory notes on demand, they may be sued without demand.(*a*) And if made payable at a particular place, demand need not be made there, but a readiness to pay the note there discharges from interest and costs.(*b*) And interest begins to run on bank-notes from demand, as on other notes payable on demand; (*c*) but not from the time of suspension of the bank, without demand.(*d*) In practice, to a very great extent, and in law to a considerable extent, bank-notes differ from all other negotiable paper.(*e*) In

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(*a*) Bryant *v.* Damariscotta Bank, 18 Maine, 240; State Bank *v.* Van Horn, 1 South. 382; Haxtun *v.* Bishop, 3 Wend. 22; Bank of Niagara *v.* M'Cracken, 18 Johns. 493, per *Woodworth*, J. In Jefferson Co. Bank *v.* Chapman, 19 Johns. 322, the opinion of Mr. Justice *Woodworth* has been said not to be that of the court; but the question is now settled. But demand must be made in Kentucky before suit brought, although it need not be averred. Bank of Kentucky *v.* Hickey, 4 Littell, 225.

(*b*) Caldwell *v.* Cassidy, 8 Cowen, 271. There seems to be a distinction taken on the question of demand between notes payable generally, which do not require demand, and those which are payable at a particular place. If payable at a specified place, it is held by one of the cases that this must be averred and proved. Dougherty *v.* Western Bank, 13 Ga. 287. If payable generally, the same case holds, no demand is necessary.

(*c*) Bank of Kentucky *v.* Thornsberry, 3 B. Mon. 519; Bank Commissioners *v.* Lafayette Bank, 4 Edw. Ch. 287. Sometimes increased interest is allowed by statute.

(*d*) Ringo *v.* Biscoe, 8 Eng. Ark. 563.

(*e*) Southcot *v.* Watson, 3 Atk. 232. In Miller *v.* Race, 1 Burr. 452, which is the leading case upon the subject, Lord *Mansfield* indulged in a good many strong expressions, and in *dicta* which were not called for by the case. A bank-note was lost, and payment stopped at the Bank of England. When presented for payment by the plaintiff, an innocent holder, the defendant or clerk would not pay it, or return it to the plaintiff, who brought trover for it. It is obvious that the action could have been

most of the States of the United States, the privilege of issuing bank paper is confined to certain incorporated companies, or parties who act under a general banking law, and all other parties or corporations are prohibited from making notes payable on demand and intended to circulate as money.(*f*)

In order to be evidence of a promise on the part of the bank, the bank-note must be signed by the officers thereof, who are

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maintained, under similar circumstances, by any innocent transferee of a negotiable instrument. But Lord *Mansfield's* remarks, which have been quoted again and again, and in many instances have misled the courts, are these: Bank-notes "are not goods, not securities nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to *all* intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash, ... and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So on bankrupteies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash." In Solomons *v.* Bank of England, 13 East, 135, *Grose*, J. said that bank-notes were to be considered as cash. See also Fleming *v.* Brook, 1 Sch. & L. 318; Stuart *v.* Bute, 11 Ves. 662; Drury *v.* Smith, 1 P. Wms. 404; Miller *v.* Miller, 3 P. Wms. 356. In Bayard *v.* Shunk, 1 Watts & S. 92, *Gibson*, C. J. said: "By the conventional rules of business, a transfer of bank-notes, though they are of the same mould and obligation (as notes of third persons) betwixt the original parties, is regulated by peculiar principles, and stands on a different footing." It is to be observed that Lightbody *v.* Ontario Bank, 11 Wend. 9, 13 id. 101, went upon the same ground with regard to the conventional character of bank-bills. Whereas, the case of Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, though agreeing with the former case in its conclusions, holds that the effect of bank-notes given in payment arises from their legal character, and not from their conventional one. This case, as well as that of Scruggs *v.* Gass, 8 Yerg. 175, mentions the distinction between prior and contemporaneous debts. The question of conventional or legal character is, after all, one of terms alone For, as will be seen on referring to our chapter on Payment, the effect of any payment by the note of a third person is rested entirely upon the intention of the parties. Now, to show this intention with regard to any particular class of notes of third persons, the general understanding is clearly the proper guide. It has been repeatedly said, that bank-notes in ordinary business transactions are to be regarded as cash. Morris *v.* Edwards, 1 Ohio, 189; Edwards *v.* Morris. id. 524; Bradley *v.* Hunt, 5 Gill & J. 58; Morrill *v.* Brown, 15 Pick. 173. From the business of banking being regulated by law, and carried on under certain restrictions, a sort of credit from that very circumstance attaches to the notes of a bank and gives them credit. Smith *v.* Strong, 2 Hill, 241; Safford *v.* Wyckoff, 1 id. 11. The value of bank-bills, and the practice of treating them as money, obviously depends upon their being redeemable, and thus converted into money at any moment.

(*f*) Stat. Pa., Mar. 19, 1810; Myers *v.* Irwin, 2 S. & R. 368; Act Pa., 21 Mar. 1814, 22 Mar. 1817; Hess *v.* Werts, 4 S. & R. 356; Stat. Mass. 1804, ch. 58, § 1; Bayley *v.* Taber, 5 Mass. 286.

designated for that purpose by the charter of the bank or a general law. These are usually the president and cashier.(*g*)

In England, the bank-notes of the Bank of England take, by statute, the place of coin.(*h*) Those of other banks are not equally privileged, and the capital of those banks is often made up in large measure of Bank of England notes. In this country nothing is a legal tender by law except the precious metals.(*i*) And not only so, the government officers are, for the most part, obliged to receive only gold or silver, and pay out only that. But the use of bank-notes as cash is far more common here than anywhere else in the world; (*j*) and even the law, as settled by adjudication, accommodates itself somewhat to this practice. Thus, it is a universal rule that current bank-bills are a lawful tender, unless objected to because not money. That is, the creditor has a right to claim coin, if he chooses to, and refuse

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(*g*) Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 26.

(*h*) 3 & 4 William IV. ch. 98, § 6, enacts that the Bank of England notes shall be legal tender for all sums above five pounds, except at the Bank of England or its branches. No notes of less amount than £ 5 are issued by the Bank of England, such issue being prohibited by 7 Geo. IV. ch. 6. In Ireland and Scotland the amount of bank-notes is limited to £ 1. 7 & 8 Vict. ch. 32. Bank of England notes are exempted from stamp duty. 55 Geo. III. ch. 184, § 21; 7 & 8 Vict. ch. 32, § 7. No banks are allowed to issue notes within sixty-five miles of St. Paul's, London. This protects the Bank of England notes. 7 & 8 Vict. ch. 32.

(*i*) The Constitution of the United States, § 10. 1, provides that "No State shall .... make anything but gold and silver coin a tender in payment of debts." By the Acts of 1861, chaps. 5, 46, 12 U. S. Stats. at Large, 259, 313, Treasury-notes are made receivable in payment of public dues, and payable for salaries and other dues from the United States. And by an act of 1862 certain kinds of government paper are made a legal tender.

(*j*) We have mentioned that the issue of bank-bills of less amount than £ 5 ($ 25) is restrained in England by 7 Geo. IV. ch. 6. In France, the smallest paper money is a bill of one hundred francs. Ordinary or common transactions do not require so large amounts. And in this country, where the denomination of bills is not regulated by statutes, bills are ordinarily used in payments of one dollar and upwards. In Ireland and Scotland, the smallest bank-bills are £ 1 in value. Encyclopædia Britannica, Art. *Money*. In some of the States, no bills of less amount than five dollars are allowed to circulate. N. Y. Stat. 1830, ch 295, made the circulation of foreign bank-bills of less amount than five dollars unlawful. Merchants' Bank *v.* Spalding, 5 Seld. 53. But wherever paper is allowed to circulate at all, the desire of banks to circulate their own notes will render bank-bills an almost universal substitute for coin. In some of the States it is made a misdemeanor to pass or receive bank-notes under some small specified sum; as three or five dollars. State *v.* Bank of Fayetteville, 3 Jones, N. Car. 450. In Massachusetts, the receiving or putting in circulation as currency a bank-note which is in whole or in part for a fractional part of a dollar is punishable by a fine. Stat. 1853, ch. 392; Gen. Stats. 1860, ch. 162, § 20.

anything else. But if current bills, by which we mean those that are redeemed at the bank counter, and are passing at par value in or during transactions,(*k*) are tendered, and he refuses them on any other ground than because they are not money, he cannot afterward make that objection, and they have then the force of so much specie.(*l*) Bank-notes are not, generally, so far cash or a legal tender, that they may be brought into court either in payment or satisfaction of a judgment and execution obtained by the bank which issued them.(*m*)

(*k*) Pierson *v.* Wallace, 2 Eng. Ark. 282. Bank-notes depreciated in value may, of course, be taken at par. White *v.* Guthrie, 1 J. J. Marsh, 503; Honore *v.* Colmesnil, id. 506.

(*l*) In England, country bank-notes are a legal tender, unless objected to, and are in some measure like cash. Owenson *v.* Morse, 7 T. R. 64; Ward *v.* Evans, 2 Ld. Raym. 928; Tiley *v.* Courtier, 2 Cromp. & J. 16, overruling Mills *v.* Safford, Peake, N. P. 180, note, Lockyer *v.* Jones, Peake, N. P. 180, note; Polglass *v.* Oliver, 2 Cromp. & J. 15, 2 Tyrw. 89, 1 Price, P. C. 133; Black *v.* Smith, Peake, 88, per Lord *Kenyon*, the offer of a bank-note, with a request of change, was held a good tender, if not objected to on that account. See Codman *v.* Lubbock, 5 Dowl. & R. 289. When, by Stat. 56 Geo. III. ch. 68, § 11, gold coin was the only legal tender for sums above a certain amount, bank-notes were held a legal tender, unless objected to on that account. Wright *v.* Reed, 3 T. R. 554; Grigby *v.* Oakes, 2 B. & P. 526; Brown *v.* Saul, 4 Esp. 267. So in America, bank-notes are legal tender, unless specially objected to on that account. Phillips *v.* Blake, 1 Met. 156, per *Shaw*, C. J.; Snow *v.* Perry, 9 Pick. 539; Jefferson Co. Bank *v.* Chapman, 19 Johns. 322; Warren *v.* Mains, 7 Johns. 476; Thomas *v.* Todd, 6 Hill, 340.

(*m*) Coxe *v.* State Bank, 3 Halst. 172. This is allowed by statute in some states. Union Bank *v.* Ellicott, 6 Gill & J. 363. In Hallowell & Augusta Bank *v.* Howard, 13 Mass. 235, the suit was brought on a promissory note due the plaintiffs from the defendant, who moved for leave to pay into court the amount of the note in the bills of the bank. It seems that the notes were much depreciated in value. The court said: "Nothing is a lawful tender but gold and silver. To permit the defendants thus to set off these promissory notes would be allowing cross demands to be set off in a like manner in every case. These notes are nothing more than evidence of a right of action. . . . . The only course in such cases would be to obtain a judgment upon the notes, and set off such judgment against the plaintiff's judgment" This does not reach the case of set-off of claims under the statute. In the Bank of Niagara *v* Rosevelt, 9 Cowen, 409, 1 Hopk. Ch. 579, a bank was held, per *Woodworth*, J., bound to take its own bills or notes in the payment of debts; and a set-off existing against the bank at the time it stopped payment would be allowed, although the debt due the bank had not fallen due. But it was held, that, although the debtor might set off the bills of the bank in the hands of another for his use, yet that they must not have been obtained after the insolvency of the bank, which decision seems to confirm the view in the text. The time of the insolvency is decisive, and not the appointment of a receiver; and the bills claimed to be held by another for the defendant's use must be shown really to have been so held. In Haxtun *v.* Bishop, 3 Wend. 13, the plaintiff was the receiver of a bank; he was held to be a trustee of the bank for the benefit of the creditors, and the debtor had bought up at par the bills on the insolvent bank after the assignment of the debt to a receiver.

Bank-notes may be a good mortuary gift or donation.(*n*)

In England, by a recent statute, they may be taken on execution, and they may, in this country, by common law and usage.(*o*)

Bank-notes pass by a will bequeathing a testator's money or cash,(*p*) and they may be so described in the memorial of an annuity.(*q*)

Nor is it an objection to an averment of "money lost in bank-notes," that bank-notes are not money.(*r*)

In fact, for every purpose in business except legal tender, bank-notes are considered as money.(*s*)

Perhaps, however, the most important particular in which they are considered cash is, that property follows possession; and this rule of law, which applies to all negotiable paper, is eminently true of bank-notes. This subject, which comes up repeatedly in different branches of the law of negotiable paper,

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The bank-bills were not allowed to be so used, for reasons of equity, stated in the text. In Mississippi, although, as between individuals, a note payable in bank-bills, when sued upon, is recoverable only in the actual value of the notes at the time the note fell due, a different rule prevails in the case of a bank, because, when the full amount of the note with interest is recovered, the defendant may after judgment pay the debt in the notes of the bank. Abbott *v.* Agricultural Bank of Mississippi, 11 Smedes & M. 405. See also Anderson *v.* Hawkins, 3 Hawks, 568; Moody *v.* Mahurin, 4 N. H. 296; Hevener *v.* Kerr, 1 South. 58; Sinclair *v.* Piercy, 5 J. J. Marsh. 63; Goodenow *v.* Duffield, Wright, 457; Adkins *v.* Blake, 2 J. J. Marsh. 40.

(*n*) Drury *v.* Smith, 1 P. Wms. 404; Miller *v.* Miller, 3 id. 356; 1 Roper, 3. See Stuart *v.* Bute, 11 Ves. 662, in Dom. Proc., 1 Dow, 73.

(*o*) At common law, bank-bills, like money, could not be taken in execution. Francis *v.* Nash, Cas. Temp. Hardw. 53, 2 Barnard., London ed. 225; Knight *v.* Criddle, 9 East, 48; Armistead *v.* Philpot, 1 Doug. 231; Fieldhouse *v.* Croft, 4 East, 510. Stat. 1 & 2 Victoria, ch. 110, § 12, allows money, bank-notes, checks, bills, promissory notes, and other securities for money, to be taken in execution. The money and bank-notes are to be handed over by the sheriff to the execution creditor. In America, as we have said *supra*, a sheriff may receive in payment current bank-notes. Governor *v.* Carter, 3 Hawks, 328; Scott *v.* Commonwealth, 5 J. J. Marsh. 643. And it has been held that bank-notes may be seized or sold on execution. Spencer *v.* Blaisdell, 4 N. H. 198. This subject is now regulated by statute in most of our States. If a note be made payable in bank-bills, or if the party agree otherwise to accept them, they are a good tender in discharge of the contract. Warren *v.* Mains, 7 Johns. 476; Edwards *v.* Morris, 1 Ohio, 524.

(*p*) Fleming *v.* Brook, 1 Sch. & L. 318; Miller *v.* Race, 1 Burr. 457; Stuart *v.* Bute, 11 Ves. 662.

(*q*) Wright *v.* Reed, 3 T. R. 554; Cousins *v.* Thompson, 6 T. R. 335.

(*r*) Towson *v.* Havre de Grace Bank, 6 Harris & J. 47.

(*s*) Edwards *v.* Morris, 1 Ohio, 524; Bradley *v.* Hunt, 5 Gill & J. 54; Morrill *v.* Brown, 15 Pick. 173; Pierson *v.* Wallace, 2 Eng. Ark. 282.

is fully considered by us in the chapter on Lost Bills or Notes. It will be seen there, that if one loses a bank-note, he who takes it for value from the finder or thief, without notice or knowledge of fraud, is entitled to the possession of it. Nor will mere neglect in not inquiring into the title of the party from whom he takes it defeat his right, unless this negligence is wilful and fraudulent.(*t*) And the American rule seems to be, that the party from whom the bank-bill is obtained by fraud or felony, or by whom it is lost, and who claims to hold the property of it on that ground, must show that it was so parted with by him, and also that the plaintiff came by the note in a way which gives him no title to it. This is going one step further in favor of bank-bills than is done in the case of ordinary negotiable paper; and it seems that the bank is not liable on showing that a note is lost, though it is so on one that is destroyed.(*v*) So, too, bank-notes are considered as cash in a case of bankruptcy, and cannot be traced and identified any more than dollars or eagles.(*w*) It has been said that an action for money had and received will not lie against one who had the bank-notes of the plaintiff without right, unless he has cashed them; but that trover, as for any other chattel, is the proper remedy. We do not believe, however, that this doctrine would now be held.(*x*) The statutes in some of the

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(*t*) The general rule is, that if any check, bill, or note, originally payable to bearer, or become so payable by a blank indorsement, pass into the hands of a *bona fide* holder for value, he has a perfect title as against the original owner and as against the promisor. For an examination of the authorities on this question, and an historical view of the law on the subject, we refer to the subsequent chapter on a Lost Bill or Note.

(*v*) On a lost note it seems that a bank is not liable to the loser, but it is otherwise if the note is destroyed. Hinsdale *v.* Bank of Orange, 6 Wend. 378, per *Marcy*, J.; Bank of Louisville *v.* Summers, 14 B. Mon. 306; Burridge *v.* Geauga Bank, Wright, 688. But in Georgia, it is only necessary to indemnify the bank to recover on the lost note. Waters *v.* Bank of Georgia, R M. Charlt. 193.

(*w*) Chitty, 524; Lowndes *v.* Anderson, 13 East, 130.

(*x*) Assumpsit for money had and received will lie for country bank-notes, and checks even, which have been treated like money. Pickard *v.* Bankes, 13 East, 20, was a case against a stake-holder who had so treated notes that he had received. Spratt *v.* Hobhouse, 4 Bing. 173, 12 J. B. Moore, 395. Perhaps the receipt of their value may be presumed, Longchamp *v.* Kenny, 1 Doug. 137; but if a finder of bank-notes has not turned them into money, or treated them as money, trover is the proper action. Noyes *v.* Price, cited by Chitty, 524, Sittings Lond. *post* Hilary term, 16 Geo. III., Ms. Sel. Cas. 242. The following cases hold that assumpsit for money had and received will not lie against a finder, unless the notes found have been turned into money. Mason *v.* Waite, 17 Mass. 560; Ainslie *v.* Wilson, 7 Cowen, 662; Arms *v.* Ashley, 4 Pick.

States go so far in favor of the circulation of bank paper, that they allow bills to take precedence of all other bank debts in case of insolvency.(*y*) But in others of the States the holders of bank-bills come in with the other creditors, like the holders of ordinary promissory notes.(*z*) Bank-notes are also held to be only negotiable paper for some purposes. They may be, and often are, indorsed. And, although we have no distinct adjudication on this question, we have no doubt that the indorser would be held in much the same manner as the indorser of other paper payable to bearer.(*a*)

The law of presentment, which is so important in its application to common notes and bills of exchange is applicable in some degree to all promissory paper; and it is certain that bank-notes should be presented for payment, for some purposes.(*b*) Undoubtedly they are intended to circulate, and this indefinitely; (*c*) for the longer the bank can keep them out, the

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71; Murray *v.* Pate, 6 Dana, 335; Kellogg *v.* Budlong, 7 How. Miss. 340; Houx *v.* Russell, 10 Misso. 246; Muir *v.* Rand, 2 Ind. 291. So negotiable notes received by defendant are often considered money. Floyd *v.* Day, 3 Mass. 403; Hemmenway *v.* Bradford, 14 id. 121; Willie *v.* Green, 2 N. H. 333. *Contra*, Mercer *v.* Sayre, Anthon, N. P. 119. If there is a fair presumption that defendant has received plaintiff's money, the action may be maintained. Tuttle *v.* Mayo, 7 Johns. 132; Hatten *v.* Robinson, 4 Blackf. 479; Haskins *v.* Dunham, Anthon, N. P. 81; Hutchinson *v.* Phillips, 6 Eng. Ark. 270; Muir *v.* Rand, 2 Ind. 291. This action will only lie in general when money may be presumed to have been actually received. M'Lachlan *v.* Evans, 1 Younge & J. 380; Spratt *v.* Hobhouse, 4 Bing. 173. See Cole *v.* Cushing, 8 Pick. 48; Ellsworth *v.* Brewer, 11 id. 316; Miller *v.* Miller, 7 id. 133.

(*y*) Robinson *v.* Bank of Darien, 18 Ga. 65.

(*z*) Cochituate Bank *v.* Colt, 1 Gray, 382.

(*a*) This is certainly implied in Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235. The indorsement would seem to indicate an intention on the part of the indorser to regard the bank-note or bill as an ordinary bank-note or bill payable to bearer, and we see no other way in which an indorsement could be treated.

(*b*) The English rule seems to be, that one who receives bank-notes or banker's notes is bound to present them or forward them the next day after they are received. This enables the transferee to recover the value of the note from the transferrer, in case the bank has failed and become insolvent. Camidge *v.* Allenby, 6 B. & C. 373, 9 Dow. & R. 391.

(*c*) And because bank-notes are intended for circulation, it would also free the taker from the charge of laches to put the note in circulation immediately. Robinson *v.* Hawksford, 9 Q. B. 52; Shute *v.* Robins, Moody & M. 133, 3 Car. & P. 80. In Camidge *v.* Allenby, 6 B. & C. 373, 6 Dow. & R. 391, *Bailey*, J. said: "Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes. They were intended for circulation. But I think that he was not bound immediately to circulate them or to send them into the bank for payment; but he was bound,

more it gains by the substitution of them for gold and silver. They are intended to be reissued again and again, and this is the constant practice with our banks, though the Bank of England never reissues a bill which has once been redeemed. This, however, is only to guard against counterfeits. Therefore English bank-notes have not often that worn and soiled appearance which ours present, and which is sometimes regarded as an indication of their genuineness. An ordinary bill of exchange, note, or order payable to a particular person, which has been paid by any person who has no resort over against another, is regarded as *functum officio*, and as having ceased to have legal existence ; but this is not the case with a bank-note which is payable to the holder or bearer.(*d*) A bank-note is never old, and it is held to be unaffected by the statute of limitations.(*e*)

A promissory note made payable in bank-bills is not everywhere negotiable. Nor does "lawful money," in the statutes, include bank-bills.(*f*) He that passes them has, of course, some right as to the matter of presentment.(*g*) If he gave them as

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within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday," the next business day after they were received.

(*d*) Beck *v.* Robley, 1 H. Bl. 89, note *a*; Mead *v.* Small, 2 Greenl. 207 ; Bryant *v.* Ritterbush, 2 N. H. 212 ; Havens *v.* Huntington, 1 Cowen, 387 ; and see *supra*.

(*e*) 12 Geo. III. ch. 72, § 39, exempts bank-notes from the statute of limitations. See Dougherty *v.* Western Bank of Georgia, 13 Ga. 287. In Selfridge *v.* Northampton Bank, 8 Watts & S. 320, it appeared that the notes were not issued until two years after their date, so that should not be evidence on the question of limitation. The date does not seem to be evidence in the case of a bank-bill. Wright *v.* Douglass, 3 Barb. 554. In F. & M. Bank of Memphis *v.* White, 2 Sneed, 482, it was held that an ordinary bank-note payable on demand is not barred until after six years from demand, and refusal at the counter of the bank ; and a mere suspension is not equivalent to such demand and refusal. The judge, delivering the opinion of the court, said, *inter alia:* "The notes exhibited in this record are payable on demand without limitation of time. It would be absurd to hold, that because payable on demand it must be taken that they were actually issued and put in circulation at their respective dates ; for, as said in the case of Greer *v.* Perkins, 5 Humph. 588, the date of a bank-note affords no presumption that it was put in circulation at that time ; it may have been filled up and dated long before it was issued ; and after issuance it may have been returned and reissued repeatedly and at distant intervals. Be this as it may, it is difficult to repel the application of the statute of limitations, that the promise to pay upon the face of the note is to be regarded as a continuing promise to pay upon demand being made, until actual refusal."

(*f*) See *supra*, Vol. I. p. 46.

(*g*) If the bank-notes are not tendered at the day, it has been held that money be

cash, and the holder keeps them in his pocket a long time, and when he presents them finds that the bank has failed, he recovers nothing against the transferrer of them, if they were good when transferred, and are lost by his delay. But it must be an unreasonable delay which thus destroys the right of the holder. He is not bound to drop all other business, and instantly carry them or send them to a bank. And if the bills are good at the hour, or during all the day when they were given, but the bank failed at night, and next morning the holder on presenting them was refused payment, we should apprehend that he might recover from the transferrer. So, too, if the taker, within the time during which he holds them without losing his right, that is, before he must present them for payment, circulates them, he still retains that right. So will any subsequent person who receives them.(*h*)

It must not be inferred from this that one who pays out bank-notes might be held if the bank, however good when he paid, should fail a month afterwards, if he who then held them at that

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comes payable for the nominal value and not for their market value. Smith *v.* Goddard, 1 Ohio, 178; Morris *v.* Edwards, id. 189, id. 524; but generally the market value of the bills has been allowed to be recovered, which seems more reasonable. Huston *v.* Noble, 4 J. J. Marsh. 130; Scott *v.* Conover, 1 Halst. 222; Wilson *v.* Hickson, 1 Blackf. 230; Osborne *v.* Fulton, id. 233; Coldren *v.* Miller, id. 296; Van Vleet *v.* Adair, id. 346; Feemster *v.* Ringo, 5 T. B. Mon. 337; Brown *v.* Durbin, 5 J. J. Marsh. 170; Kennedy *v.* Vanwinkle, 6 T. B. Mon. 398; Abbott *v* Agricultural Bank of Mississippi, 11 Smedes & M. 405; Garner *v.* The State, 5 Yerg. 160.

(*h*) For a full discussion of the duties of presentation for payment, and what is laches, making the bill the taker's and at his risk, consult the notes to the chapter on Payment, section on Payment by Bank-bills or Notes. See also note *c*, *supra*, p. 94. In Timmins *v.* Gibbins, 18 Q. B. 772, 14 Eng. L & Eq. 64, M. W. deposited certain bills on a country bank on the 26th of the month; the notes were presented to the London agents of the bank the next day, when it was discovered the bank had stopped the 26th. The notes were returned, and notice of dishonor given to the plaintiff, and it was held, that the plaintiff was by this barred an action for money lent or money had and received. Turner *v.* Stones, 1 Dow. & L. 122. A £5 bank-bill was changed for the defendant on Saturday. Monday the banking-house was opened two hours before it stopped payment; but the jury thought the bill would not have been paid had it been presented. The same day the note was sent to the defendant, and the money demanded. The duty of holder in such a case was stated to be to give prompt notice of the stoppage of the bank, and to tender the note to the transferrer; this had been done in this case. From this and the former case, insolvency appears to date from the close of the banking hours, after which the bank never opens. It seems from this case that presentment at the bank itself in case of insolvency is not required, but that promptness in notice and return are necessary. In England, after passing the bill, the taker must have had time and an opportunity to get his money from the bank.

time had received them shortly before, and they had passed during that month from hand to hand, without unreasonable delay in any part of the chain. Such a decision would not be made, and the courts might avoid it, if on no other ground, then on the ground that these notes are cash.

It is also said, that the holder must present the notes, if the bank be shut up, if he would have a valid claim against the transferrer. It is certain, however, that bank-notes are never overdue, and their mere age does not affect them with suspicion.

Nor are they, if transferred when old, open to the equities of defence which might be urged against negotiable paper transferred and received when overdue.(*i*)

(*i*) The case of Camidge *v.* Allenby, 6 B. & C. 373, 9 Dow. & R. 391, implies that the duty of the holder is either to present at the bank, or to circulate the next day, or to give notice of the insolvency. "If presentment was unnecessary," says *Bayley*, J., "he (the holder) had another duty to perform. . . . . The law requires that the party on whom the loss is to be thrown shall have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note." In Turner *v.* Stones, 1 Dow. & L. 122, cited in last note, Mr. Justice *Coleridge* delivered the opinion of the court, and all the previous cases were ably reviewed. Rogers *v.* Langford, 1 Cromp. & M. 637, is quoted, and the remarks of Mr. Justice *Bayley* were repeated, as follows: "I think the notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them, or of making the best of them." Upon these remarks Mr. Justice *Coleridge* makes the following nice criticism: "I confess I feel a difficulty in seeing the relation to each other of these alternatives; presentment at the bank should seem to be required on the principle that the bankers are primarily liable, and the former holders only secondarily on their default, which is not established till a demand on them according to the terms of the contract. But if this be so, how is this affected by a prompt return of the note to the holder, and a demand from him at a time when by the hypothesis his secondary liability has not arisen? On the other hand, how can a presentment at the bank in due time dispense with the responsibility of prompt notice and return of the notes to the former holder, who may have the means of recovering the value from the person from whom he received them, and who certainly has a right to consider that the person who keeps the notes an unreasonable time in his possession has thereby decided to make them his own? . . . . . Where, therefore, a presentment at the bank could not reasonably be expected to produce payment, I think the obligation on the holder is to give notice promptly to the party from whom he receives the note, and to tender him the note; this enables that party not merely to present at the bank, but to have recourse to the former holder, if he himself shall have so dealt with the note while he held it as to have preserved any rights as against that holder." This seems to us to be the soundest doctrine on the subject. By this, presentment is not necessary in every case, but return of the note is required. If this is the true English rule, it is very like the American doctrine, which we do not think requires presentment in all cases, but makes notice and return of the note necessary, unless waived by particular circumstances. In Phillips *v.* Blake, 1 Met. 156, *Shaw*, C. J. says: "It is

What is the unreasonable delay of presentment which would discharge one who transferred them when they were good is not determined with any exactness. It is said to be a question for the jury. But, we apprehend, a jury would rarely find a transferrer of good bank-bills responsible for a subsequent failure, after any considerable time (by which we mean anything more than a day or so) had elapsed before the failure.(*j*)

In the chapter on Payment by Bill or Note, we consider the case of a bank receiving payment of a debt in bills which purport to be its own, but are in fact counterfeit or forged; and we come to the conclusion that, if a bank receives payment for a debt (whether its own or one held by it for collection) in such bills, it is bound by it as to every one but the giver, and probably as to him, if he made the payment in good faith. For the bank is under a stronger obligation than any customer can be to

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extremely questionable, when bank-notes are paid and received, whether it can be averred that they would not have been paid on presentment, without presentment made. Until such presentment there was no default, and the notes were not dishonored." No doubt the general rule is, that negotiable paper must be presented, although the maker is insolvent. Bowes *v.* Howe, 5 Taunt. 30; Sands *v.* Clarke, 8 C. B. 751. And in Harley *v.* Thornton, 2 Hill, S. Car. 510, it was said: "It is always necessary that the note should have been presented within a reasonable time, when the party intends to charge the person from whom he took it." In Scruggs *v.* Gass, 8 Yerg. 175, which is generally quoted to show that the law in Tennessee is, that the risk is on the taker of a bank-bill, as far as the solveney of the bank is concerned. It was said: "This court does not say but that Scruggs might have avoided the effect of payment in bank-notes, by having presented them to the bank for payment, and on refusal notified Gass of the fact." In Lowrey *v.* Murrell, 2 Port. Ala. 280, a *dictum* in Whitbeck *v.* Van Ness, 11 Johns. 409, which has since been overruled, was quoted as the ground of the decision. The *dictum* was, that the transferrer of the bank-bill did not warrant the solvency of the bank. But it is to be observed in this case, that there was no diligence in attempting to collect the bill, and no offer to return it, so that the decision might well have gone upon this ground. In Snow *v.* Perry, 9 Pick. 539, there was decided laches in giving notice to the defendant. It seems that, even if the transferrer were liable from having agreed that the bank-bills should be at his risk, he is entitled to proper legal notice of a default in payment. In Young *v.* Adams, 6 Mass. 182, we are reminded by the court, that, after all, bank-bills are only private contracts, having no public sanction. Alexander *v.* Dennis, 9 Port. Ala. 174, was a case of fraud, and no notice or return of the bills was held necessary to bind the payer of them. Where one passed a bill on a broken bank fraudulently, or with a promise to take it back if it proved uncurrent, a demand on the makers need not be proved. Hellings *v.* Hamilton, 4 Watts & S. 462. In Bank of Niagara *v.* M'Cracken, 18 Johns. 493, and in Jefferson Co. Bank *v.* Chapman, 19 id. 322, bank-notes are spoken of as forming an exception to the ordinary rules with regard to presentment and notice. See Caldwell *v.* Cassidy, 8 Cowen, 271.

(*j*) See cases cited in preceding note.

know its own bills.(*k*) It might at first seem that when a bank takes its own bills on *deposit*, that it should not be liable in case they turn out to be forged; for *deposit* implies a bailment entirely for the benefit of the bailor, and that slight diligence only would be required of the bailee. This would perhaps be true of a special deposit. But bank deposits really are what were termed *mutua* in the civil law. A use of the money is contemplated, and a debt is created from the bank to the depositor. The bank is as much bound by receiving its own bills on deposit as when they are taken in payment of a debt.(*l*) We do not think that a bank is bound to know whether a bill on another

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(*k*) See *post*, chapter on Payment by a Bill or Note. If a bank receive in payment or on deposit counterfeit bills, purporting to be on the bank receiving them, the person who innocently pays or deposits the bills is not liable, and the bank must bear the loss. This is much upon the same principle that a drawee is bound to know his drawer's signature, and if he accepts a bill in which the drawer's name is forged, he is still liable on his acceptance. Price *v.* Neal, 3 Burr. 1354; Smith *v.* Chester, per *Buller*, J., 1 T. R. 655; Smith *v.* Mercer, 6 Taunt. 76; Bass *v.* Clive, 4 Maule & S. 13; Wilkinson *v.* Lutwidge, 1 Stra. 648; Jenys *v.* Fawler, 2 id. 946. U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333, is the leading case upon the subject. The Bank of Georgia issued the bank-bills in question; they found their way into the Bank of the United States, and were presented, received as genuine, and placed to the general account of the United States Bank. The forgery was discovered nineteen days afterwards, when the bills were tendered to the bank of the United States and refused. It was a question which of two innocent parties should bear the loss. The receipt of the bank-notes was deemed an adoption of them. This was said to be demanded by public policy, every bank having the best means of knowing the genuineness of its own bills. The bills were received on deposit. Levy *v.* Bank of U. S., 4 Dall. 234, 1 Binn. 27, and Bolton *v.* Richard, 6 T. R. 139, were cited as authorities, both of which were cases of checks which were paid, accepted, and carried to the credit of the transferrer. Gloucester Bank *v.* Salem Bank, 17 Mass. 1, 33, was also cited. This case is in point, but, like the case in Wheaton, may be made to rest on the laches of the transferee in not discovering the forgery and returning the bills. In the Massachusetts case the bills were in a bundle, and were not examined by the cashier of the transferee bank until some time had elapsed. Notice of the doubtful character was given in fifteen days, and that the bills were forged, in fifty days after receipt. The court said, p. 45: "The true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply to all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." The law would be the same in Delaware, we think. *Vide* Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235.

(*l*) See cases in preceding note.

bank is genuine or not.(*m*) Nor is there any reason to think that a bank, in receiving bills on another bank, takes the risk of its solvency, any more than an individual would do. But in States where the risk is on the taker, it makes no difference whether the bank receives the bills in payment or on deposit, as is decided in one case.(*n*) But we do not think the attention of the courts has been directed particularly to this point, for reasons above stated. In our chapter on Lost Bills and Notes, we consider the subject of halved notes, and show that in England it seems to be the opinion of courts that bank-notes, when sent by post, should be remitted in halves by different conveyances.(*o*)

We do not find this rule in America, nor do we think the practice so common here as in England; although there are cases in which this appears to have been done. The conclusion we have come to is, that the owner and holder of half a bank-bill has, strictly speaking, no claim against the bank, because he has no possession of the bill, and this is necessary to make him a *prima facie* owner.(*p*) But as by severing the bill, the negotiability of either half alone is destroyed, the holder of one half may show that he came by it honestly, as that it was sent him by mail, or that the other portion has been lost, and where this appears the holder will be allowed to recover; and it appears that notice from the bank that they will not pay a bill unless the whole of it be produced, is not binding upon any holder of half of a bank-bill, if he prove himself the owner of the other half.(*q*) But

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(*m*) Frontier Bank *v.* Morse, 22 Maine, 88. Here the bills in question were given the bank at the request of the cashier; but as they proved insolvent, the bank was allowed to recover.

(*n*) Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235.

(*o*) Observations in Lane *v.* Cotton, 1 Salk. 17. See chapter on Lost Note, for a full discussion of the questions. See also Hawkins *v.* Rutt, Peake, 186; Parker *v* Gordon, 7 East. 385.

(*p*) Patton *v.* State Bank, 2 Nott & McC. 464; Armat *v.* Union Bank, id. 471, note; U. S. Bank *v.* Sill, 5 Conn. 106. In Mayor *v.* Johnson, 3 Camp. 324, Lord *Ellenborough* thought that, when one had severed a bill and lost one half of it, he could not maintain an action upon the remaining half; but where one set of halves only arrives by the mail, the holder will be allowed to recover. Hinsdale *v.* Bank of Orange, 6 Wend. 378; Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; State Bank *v.* Aersten, 3 Seam. 135; Martin *v.* Bank of U. S., 4 Wash. C. C. 253; U. S. Bank *v.* Sill, 5 Conn. 106. Or if the other half appears to have been lost or destroyed. Commercial Bank *v.* Benedict, 18 B. Mon. 307; Northern Bank *v.* Farmers' Bank, id. 506.

(*q*) It seems that the mere holding of one half does not give any right against the bank, but that the bank is entitled to have the manner of loss shown, and also, if

where a number of bank-notes are mutilated and severed for the purpose of making others out of them fraudulently, it is said that no recovery can be had upon any of the notes so severed.(*r*)

We shall quite fully consider, in the chapter on Payment by Bill or Note, the questions which are raised when this payment is made by forged bank-bills, or by bills of an insolvent bank. Here we will only say, that forged bills, if used as a payment from one individual to another, can hardly be called a payment under any circumstances ; (*s*) but the receiver is bound by them as if they were payment, if he fails to show proper diligence in reference to them, or want of notice to the giver, and the giver shows that he has thereby lost any opportunity of indemnifying himself, or otherwise sustained damage.(*t*) No doubt the taker

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necessary, to receive indemnity ; but it is plain that the holder of one half of a severed bill stands in a much better position than the owner of a lost bill. Bank of Virginia *v.* Ward, 6 Munf. 166 ; Farmers' Bank *v.* Reynolds, 4 Rand. 186. The bank is evidently entitled to have those prerequisites performed, and if they are not performed, no interest or costs will be recovered because of a refusal to pay.

(*r*) See cases cited in last note.

(*s*) The transfer of forged bank-bills effects nothing ; the transferee may recover money paid for them, or perhaps the value of anything given or sold for them, on the ground of entire absence or failure of consideration. Jones *v.* Ryde, 5 Taunt. 488 ; Wilkinson *v.* Johnson, 3 B. & C. 428 ; Young *v.* Adams, 6 Mass. 182 ; Phillips *v.* Ford, 9 Pick. 39 ; Mudd *v.* Reeves, 2 Harris & J. 368. This was a case of a forged bank-bill, given for the price of a gelding. Both parties were equally innocent ; the loss was held to be that of the transferrer, and the price of the gelding was recovered by the transferee. Keene *v.* Thompson, 4 Gill & J. 463 ; Hargrave *v.* Dusenberry, 2 Hawks, 326. A counterfeit bank-note may be treated as a nullity. A five-dollar bill was altered to a fifty-dollar bill. Markle *v.* Hatfield, 2 Johns. 455 ; Salem Bank *v.* Gloucester Bank. 17 Mass. 1, 33 ; Simms *v.* Clark, 11 Ill. 137 ; Ramsdale *v.* Horton, 3 Penn. State, 330 ; Anderson *v.* Hawkins, 3 Hawks, 568 ; Pindall *v.* Northwestern Bank, 7 Leigh, 617 ; Wilson *v.* Alexander, 3 Scam. 392 ; Eagle Bank *v.* Smith, 5 Conn. 71 ; Thomas *v.* Todd, 6 Hill, 340. See notes on the chapter on Payment, section on Payment by Bank-Bills.

(*t*) Gloucester Bank *v.* Salem Bank, 17 Mass. 1, 33, was a case of counterfeit bank-notes, in which notice of the doubtful character of the bills was given fifteen days after they were received ; and they were declared counterfeit fifty days after their receipt. The decision, as we have before seen, went in part perhaps upon the duty of banks to know their own bills ; but negligence was somewhat discussed. "If it be said that the question whether there has been unreasonable delay or negligence is a question of fact for the jury, the answer is, that a judge, on the facts in this case, would be bound to instruct the jury that, in point of law, there had been negligence, so that a new trial would be altogether fruitless." See Thomas *v.* Todd, 6 Hill, 340 ; Ramsdale *v.* Horton, 3 Penn. State, 330 ; Markle *v.* Hatfield, 2 Johns. 455 ; Fogg *v.* Sawyer, 9 N. H. 365. In Simms *v.* Clark, 11 Ill. 137, it is said : "The law undoubtedly is, that a party who innocently pays away a counterfeit bill is not bound to take it back, unless it is returned upon him in a

may, by an express or an implied agreement, assume the risk of forgery.(*u*)

We shall see, in the chapter on Payment, that it is not quite determined what is the effect of payment in bills of a bank actually insolvent at the time the payment is made (meaning by actual insolvency, an avowed failure to redeem its bills), but not known to be insolvent or near insolvency by either party. The authorities differ; and the circumstances of each case must have great influence in the decision of it. We should say, however, on what seems to be the weight of authority, that the presumption of law was in favor of regarding the bills as a conditional payment only, which became absolute if any circumstances or evidence showed that this was the intention of the parties; or if the receiver actually succeeded in cashing them, or failed to use all proper diligence to cash them, or to give notice to the payer to save himself if he could.(*v*) Much of the uncertainty arises from the difficulty of determining the facts in each case in relation to the time or the evidence of the insolvency, or the times and circumstances of the bargain, and the further difficulty of separating the law from the fact.(*w*) The burden is, we think, on

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reasonable time after it is discovered to be spurious, and the reason of the rule is to enable him to trace out and fall back upon the person from whom he received it. But what shall be considered a reasonable time must necessarily depend on the situation of the parties, and the facts and circumstances of the particular case." In this case, the notice of the spurious character of the bills was not shown to have been given for twenty days. The jury found the time reasonable, and the court would not disturb the verdict. The discovery of the spurious character throws upon the taker the duty of notifying his transferrer, and the reasonable time is to be reckoned from the time of discovery. It was also held, that an offer to return the note was dispensed with by the transferrer's saying that he would not take back the note till compelled to do so by law. Raymond *v.* Baar, 13 S. & R. 318. One receiving a counterfeit bank-bill kept it about six months after discovering the spurious character thereof, and then gave notice to the defendant. This was held such negligence as would prevent a recovery. Thomas *v.* Todd, 6 Hill, 340. A bill was discovered to be counterfeit about May 25, and kept till July 4, following. This was held to be an unreasonable delay, and to defeat all remedy. It seems that notice should be given the transferrer as soon as possible after the spurious character is discovered. We do not think any presentment is to be required in the case of a forged bank-note, although such presentment would determine the character of the bill; but such presentment would be merely ceremonial and nugatory.

(*u*) See Ellis *v.* Wild, 6 Mass. 321.

(*v*) See *supra*, pp. 96, 97, notes *h* and *i*.

(*w*) In regard to this source of confusion, Chief Justice *Ames*, in Bicknall *v.* Waterman, 5 R. I. 43, 49, remarked as follows: "What was the agreement of the parties

the receiver to prove such diligence and notice; but when they are proved, he will recover the amount from the payer.(*x*) And perhaps even a want of diligence and notice will not defeat the claim of the receiver, without some evidence that the payer has been thereby injured.

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with regard to the transfer of a note or bill, that is, whether it was by way of sale or exchange, or, in case of a precedent debt, whether by way of complete payment or as mere security for payment of it, is a question of fact, and varies with the proof, direct and presumptive, in cases in other respects similar. It is obvious what contrariety of decision must necessarily arise, if courts, mistaking their province, undertake to decide such questions as if they were questions of law; and, however they decide them, of what little value their decisions must be as precedents."

(*x*) With regard to the question whether, where one innocent party makes payment to another in bills on a bank at that time actually insolvent, the transferrer or transferee shall suffer, there is an irreconcilable difference in the American decisions; but we think the better opinion is, and it is the one sustained by the weight of authority, that the holder of a bank-bill at the moment the bank becomes insolvent must be the loser, and it matters not how distant from the bank or how innocent the parties are, provided there be no laches on the part of the taker. See a very full note on the subject, under the chapter on Payment. The subject was much discussed, and the rule we have stated was held, in Lightbody *v.* Ontario Bank, 11 Wend. 9, 13 id. 101. It was, however, held, that between the receipt of the bank-bill and the failure of the bank there must have been an opportunity to present the bill, in order to throw the risk of loss upon the transferee thereof. The insolvency of the bank is referred to the time of actually stopping payment. "It is supposed that any particular note presented before that time would have been paid." Roget *v.* Merritt, 2 Caines, 117; Fogg *v.* Sawyer, 9 N. H. 365; Thomas *v.* Todd, 6 Hill, 340; Harley *v.* Thornton, 2 Hill, S. Car. 509; Wainwright *v.* Webster, 11 Vt. 576; Gilman *v.* Peck, id. 516; Frontier Bank *v.* Morse, 22 Maine, 88; Houghton *v.* Adams, 18 Barb. 545. In several of the States the risk seems to be on the transferee, when the transferrer is innocent. Bayard *v.* Shunk, 1 Watts & S. 92, per *Gibson*, C. J., *et curiam*; Scruggs *v.* Gass, 8 Yerg. 175; Edmunds *v.* Digges, 1 Grat. 359; Lowrey *v.* Murrell, 2 Port. Ala. 280. Young *v.* Adams, 6 Mass. 182, hints at the same doctrine as prevailing in that State, and goes further than the English law in favor of bank currency. Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, is the strongest and most ably argued and decided case on the subject; but the court were not unanimous. In the case of Snow *v.* Perry, 9 Pick. 539, the bank became insolvent the next day, as was the case in Turner *v.* Stones, 1 Dow. & L. 122. See Imbush *v.* Mechanics', &c. Bank, 1 West. Law Jour. 49. The English cases seem to hold that there must be implied, in the absence of express agreement, an understanding that at the time of transfer the note will be paid at the counter of the bank, and the time after the transfer during which the solvency of the bank is still at the risk of the transferrer is until the transferee has time to present the bill which is taken, and possibly the risk of the transferrer may continue so long as the bill continues in *active circulation*; i. e. no one holding it more than twenty-four hours. Canidge *v.* Allenby, 6 B. & C. 373, 9 Dowl. & R. 391, is a very leading case. Goods were sold, and a few hours afterwards bills on a bank given in payment for them, which bank had stopped payment a few hours before the bills were transferred. This was unknown to either party. The notes were not presented for a week, when the defendant was

The question as to the rights of innocent parties, between whom a bill on a bank already insolvent has passed, is involved with two others, which are also not without their difficulty. The first is, whether the entire or partial insolvency of the bank has any bearing upon, or makes any difference with, the responsibility of the transferrer. Of course, where the risk is held to be at any rate upon the transferee, the question is of no importance; but in these very jurisdictions this question has been raised. In some cases, it is said that most bank-bills are circulated more or

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required to take them back. The case went upon the laches of the plaintiff, but the payment by bank-notes was much discussed. *Bayley*, J. made a distinction between contemporaneous and precedent debts, which is fully discussed under Payment, and thought that if at the time of a sale bills of an insolvent bank are passed as payment, that the taker must run the risk of the bank's insolvency; but put his decision on the ground that, if a holder of notes given for a prior debt were not diligent, he would make the notes his own property by these laches. He said, however, that bills were for circulation, and that the taker was not bound to circulate immediately, but in a reasonable time, namely, the next day. He seems to regard presentment as unnecessary, but that it is the duty of the holder to give notice to the transferrer. *Holroyd*, J., in the same case, regards the notes as payment, but says that if they are mere promissory notes they are still payment, on account of the laches of the plaintiff. *Littledale*, J. regards the bank-notes as payment and at the risk of the taker, but rests the case upon the laches of the plaintiff. He distinguishes bills on a broken bank from forged bills, and denies any guaranty of the solvency of the maker of a note payable on demand to bearer. This case seems to hint that the rights of the transferee would be preserved by circulating the bank-bill as much as by presenting it, or, as it seems he may do, by giving notice of insolvency and tendering the bill. We do not think with regard to bank-bills there is any distinction between prior and contemporaneous debts. The intention of the parties and their understanding must if possible be discovered, and it seems to us that it is not different in one case from another. In Timmins *v.* Gibbins, 18 Q. B. 722, 14 Eng. L. & Eq. 64, Lord *Campbell*, C. J. says: "I feel great difficulty in seeing any distinction between payment for goods sold at the time and payment for them at a future day. In both cases it is a transaction of buying and selling, and even where the money is paid over the counter there must be some interval during which the buyer was debtor." But this point was unnecessary to the decision, per *Wightman*, J. In Rogers *v.* Langford, 1 Cromp. & M. 637, it appeared that on the 23d of November A paid for goods in a bank-note; on the 28th instant B got A's servant to change the country bank-notes he had taken for money. The bank stopped payment the same day. A heard of it the 28th, and on the 29th gave notice of the failure, and desired an exchange of the notes, which, however, were not tendered back till long afterwards. Nor were they ever presented at the bank. A was not allowed to recover against B the value of the notes. It was thought that the bills ought to have been presented or returned without delay, per *Bayley*, J. Turner *v.* Stones, 1 Dow. & L. 122, seems to determine whether the holder at *the time of failure* must bear the loss. The plaintiff, late on Saturday, changed for the defendant a £5 note; the bank had then virtually stopped payment. The loss was the transferrer's. See beginning of the

less at a discount; and so long as they were worth anything, the risk must be on the transferee, who, as it were, bought the bills, and took the risk of depreciation. But it is not clear that, in the purchase of a note, a partial depreciation is any more at the taker's risk than a total loss by the maker's insolvency. When he purchases a note, he runs the risk of both; but not so with a bank-note, because that is taken with the understanding that it is current and redeemable, and if so, there is no more risk of partial than of total insolvency.(*y*)

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note. In this case the authority much relied on was Henderson *v.* Appleton, cited in Chitty on Bills, 9th ed., p. 356, note *t*. In this case the bills were not presented, but on the day they might, in course of post, have been presented, the plaintiff offered them to the defendant, who refused them. The verdict for the plaintiff was allowed to stand. See also Ward *v.* Evans, 2 Ld. Raym. 928; Ex parte Blackburne, 10 Ves. 204; Brown *v.* Kewley, 2 Bos. & P. 518; Owenson *v.* Morse, 7 T. R. 64; Emly *v.* Lye, 15 East, 7, 13, per *Bayley*, J.; Ex parte Blackburne, 10 Ves. 204; Camidge *v.* Allenby, 6 B. & C. 373; Puckford *v.* Maxwell, 6 T. R. 52; Fenn *v.* Harrison, 3 T. R. 757; Lightbody *v.* Ontario Bank, 11 Wend. 9, 13 id. 101; Harley *v.* Thornton, 2 Hill, S. Car. 509; Thomas *v.* Todd, 6 Hill, 340; Fogg *v.* Sawyer, 9 N. H. 365; Magee *v.* Carnack, 13 Ill. 289; Wainwright *v.* Webster, 11 Vt. 576; Gilman *v.* Peck, 11 Vt. 516; Frontier Bank *v.* Morse, 22 Maine, 88; Commonwealth *v.* Stone, 4 Met. 43.

(*y*) In Lightbody *v.* Ontario Bank, 11 Wend. 9, 13 id. 101, after offering to return the bills, the defendant having refused to receive them, the plaintiff, the transferee, received thirty-three per cent of their value from the receiver who was appointed. This was not regarded as making any difference. Gilman *v.* Peck, 11 Vt. 516; Frontier Bank *v.* Morse, 22 Maine, 88. Lowrey *v.* Murrell, 2 Port. 280, while it seems to make a distinction between bills worth less than par and those which are entirely worthless, nevertheless decides that the bill is at the risk of the taker, so far as the insolvency of the *maker* is concerned. This being the determination, the distinction is unavailing, and so far *obiter*. In Bayard *v.* Shunk, 1 Watts & S. 92, which decided that the risk is on the taker of a bill on an insolvent bank, a strong distinction is taken between bills on banks which are insolvent and counterfeit bills. The latter are distingnished from the former, from the fact that they are usually not worthless, but depreciated in value,— although in the particular case every vestige of the bank had disappeared in a few hours after payment was stopped, yet it was suggested that bills on an insolvent bank are usually worth something. This distinction on the ground of partial value is well met by *Parker*, C. J., in Fogg *v.* Sawyer, 9 N. H. 365, who suggests that no counterfeit is passed which has not some intrinsic value, and that many are worth a large per cent of the coins they purport to be. The distinction between prior and contemporaneous debts was taken by one of the judges in the famous case of Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391. A quantity of corn was sold the defendant in the morning of the 10th of September. In the afternoon of the same day the notes were delivered which proved bad. *Bayley*, J. said: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. . . . Here the notes were given to him in payment subsequently, and the question is,

The question, whether it makes any difference as to the risk of insolvency if the bill be transferred for a prior or contemporaneous debt, is raised in courts of the highest authority. If the bill or note of a third person be passed at the time of a sale, i. e. for a contemporaneous debt, as we shall see in our chapter on Payment, the risk of the maker's solvency is upon the transferee, provided both parties are innocent. This we believe to be the rule everywhere. If the note of a third person be passed for a previous debt, the presumption is that it is intended as a conditional payment only; to be an absolute payment, in case the holder obtains payment on it, or is guilty of laches, which makes the bill his own. This, however, as we shall also see in the chapter on Payment, is not the law of Maine, Vermont, or Massachusetts, in which States the note, whether for a precedent or contemporaneous debt, is presumed to be payment, and the risk of the maker's solvency is on the transferee. In most of the courts a note for a previous debt may operate as payment by agreement, which may be express or implied; but some courts hold that it must be express.

So far as bank notes or bills are regarded as the notes of third persons, and coming under the ordinary rules of negotiable paper, these distinctions must be understood to apply. But in the case of bank-notes, we think the obligation is entirely independent of the fact whether passed for a prior or contemporaneous debt, and that this makes no difference whatever; because, as we have already said, there is a general understanding that the bill is current, and will be redeemed at the counter of the bank, if presented.

The law everywhere will protect one who receives bills on a

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whether they operate as a discharge of the debt due to the plaintiff in respect of the corn." The other judges did not assent to the distinction, but decided that, if the notes were money, they were payment; if common promissory notes, there was negligence. This distinction, taken by *Bayley*, is discountenanced by Lord *Campbell*, in Timmins *v.* Gibbins, 18 Q. B. 722, 14 Eng. L. & Eq. 64, who says that he could never see any reason in making the distinction; and remarks, that in all cases, even in those of payment over the counter, there must be some time elapsing between debt and payment, which makes the debt a precedent one. In Lightbody *v.* Ontario Bank, 11 Wend. 9, 13 id. 101, the distinction is mentioned with approval. See also Scruggs *v.* Gass, 8 Yerg. 175. The distinction is discarded in the American cases Lowrey *v.* Murrell, 2 Port. Ala. 280; Edmunds *v.* Digges, 1 Grat. 359, and per *Layton*, in Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235.

broken bank, on representation that they are good; and passing a bill of a bank known to be broken is a fraud.(z)

Post-notes seem to occupy a position between the bank-bill, on the one hand, and the promissory note, on the other. They are payable on time, and are still intended to circulate as money. They are not generally subject to the rules of promissory notes, but are like bank-bills.(a) It has been held that a power to issue paper for circulation includes them.(b) The general rules of demand and notice are not applicable to them.(c) In some of the States they are void by statute.(d) We would add, that bank-bills issued contrary to law or statute, or under an unconstitutional law, are void *ab initio*.(e) In suing a bank-bill, it is unnecessary to describe it by its letters or numbers.(f) The word "bank-notes," in a penal statute, was held to include those of banks of England and Scotland.(g)

(z) He who receives bills on a broken bank, on representation made to him that they are worth their nominal value, does not take them at his own risk. The question whether passing a bill on a broken bank, and receiving good money in exchange, without any words, is a representation that the bill is worth what it purports to be, depends on the attendant circumstances. If the bill is known to be nearly or wholly worthless, the fraud is a punishable offence. Commonwealth *v.* Stone, 4 Met. 43; Young *v.* Adams, 6 Mass. 182. When innocently passed with representations that it is good, the risk is on the transferrer. Aldrich *v.* Jackson, 5 R. I. 218. Even in those States where ordinarily a bank-bill is at the risk of the taker. Gilman *v.* Peck, 11 Vt. 516; Jefferson *v.* Holland, cited in Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, 260, which is to the same effect. Alexander *v.* Dennis, 9 Port. Ala. 174. Of course the case is stronger where the representation is fraudulent. Id.; Hellings *v.* Hamilton, 4 Watts & S. 462.

(a) Fulton Bank *v.* Phœnix Bank, 1 Hall, 562, 577.

(b) Campbell *v.* Mississippi Union Bank, 6 How. Miss. 625.

(c) Key *v.* Knott, 9 Gill & J. 342.

(d) Stat. N. Y. 1840, p. 304, § 4; Swift *v.* Beers, 3 Denio, 70; Tyler *v.* Yates, 3 Barb. 222; Bank of Chillicothe *v.* Dodge, 8 Barb. 233.

(e) Root *v.* Wallace, 4 McLean, 8; Davis *v.* Bank of River Raisin, 4 McLean, 387; Skinner *v.* Deming, 2 Ind. 558.

(f) Carey *v.* Greene, 7 Ga. 79.

(g) Case of Gray, 1 Hume, Comm. 145, note 1.

CHAPTER V.

OF INSTRUMENTS SIMILAR IN CHARACTER TO NOTES AND BILLS.

Letters of credit are not bills of exchange, although they resemble them in some respects. A person in New York, for example, who proposes to purchase goods in Calcutta, takes with him to that place, or sends in his ship, or by his agent, a letter to a house established there, in which some one duly authorized by that house writes to them to furnish the bearer, or sender, with whatever money he may desire to a certain amount; or perhaps he takes a letter from an agent of Baring, Brothers, & Co., in New York, authorizing drafts or opening a credit upon them. The writer of the letter of credit may be only the agent of the house to which he writes, and then he takes security for that house from the person in whose favor he writes, or he may be a merchant who has funds in the hands of that house, in which case he takes security to himself. In either case, it is a transfer of funds from one place to another for purposes of trade, without actual transfer of money; and in so far it is like a bill of exchange. It differs from it, however, in not being payable absolutely, and for a certain amount. It is more convenient, in many cases, for the reason that he who is to receive and employ the funds cannot tell, until he learns upon the spot, the prices which rule in the market, and other circumstances, or how much he shall want, or indeed whether he shall conclude to use any. And as he only engages to pay for so much as he takes, he is not obliged to pay the cost of more than he may need, in order to secure all that he shall find necessary. This transaction approaches in character to the purchase of bills of exchange, in proportion as it provides for him who takes the letter a specific sum, payable at all events, and as he pays a specific sum on this side to secure this provision. Still, unless it assumes the form of a sale and purchase of bills of exchange, it

does not come under those peculiar rules of the law merchant which relate to negotiable paper, but is governed by the general principles of the law of contracts.(*a*)

Circular notes, as they are called, are a still more recent invention, and are now used extensively, both in this country and in Europe; but by travellers almost exclusively. They are generally, but not always, for specific sums, and are in fact letters of credit, which a banking-house gives to a traveller, and which are made available on presentation to any of the agents or correspondents of the house in a long list of places, the names both of the places and of the agents in them being usually stated in the instrument itself. A principal object of this is to enable a traveller to supply himself with funds frequently and at various points, and thus to prevent the necessity of carrying with him large sums of money, or depositing them at the principal centres of business along his route. These are usually transferable by indorsement, and are perhaps more like bills of exchange than ordinary letters of credit, but are not the same, nor would they be in all respects governed by the law of negotiable paper.

There are also several other instruments, which, from their entering largely into the business of commerce, and passing rapidly from hand to hand, have become subject, in some respects, to the peculiar rules which govern negotiable paper. We have remarked repeatedly that the reason of these rules must be sought in the purpose and object of negotiable paper, which is to take the place of, and represent, money. The truth of this is

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(*a*) In Orr *v.* Union Bank of Scotland, 1 Macq. H. L. Cas. 513, it was held, in the House of Lords, on appeal from Scotland, that the rules applicable to negotiable securities do not hold with respect to letters of credit. The letter of credit there was in this form: "Please to honor the drafts of A to the extent of £460 9*s.*, and charge the same to the account of B." Lord *Cranworth* said: "I am not at present satisfied that there is any distinction between a letter of credit and any other security." Lord *Brougham* said: "I am inclined to think that there is no very great novelty or peculiarity in letters of credit, to take them out of the general law applicable to mandates. I am not aware that there is anything in the mercantile law, or the custom of merchants, to distinguish letters of credit from any other authority to pay money." For the principles of law applicable to letters of credit generally, see Russell *v.* Wiggin, 2 Story, 213; Ulster County Bank *v.* McFarlan, 5 Hill, 432; Baring *v.* Lyman, 1 Story, 396; Lonsdale *v.* Lafayette Bank, 18 Ohio, 126; Beach *v.* State Bank, 2 Ind. 488; Birckhead *v.* Brown, 5 Hill, 634, 2 Denio, 375; Carnegie *v.* Morrison, 2 Met. 381; Union Bank of La. *v.* Coster, 3 Comst. 203.

strikingly exemplified by the rule that a bill of exchange or promissory note, payable to bearer, or payable to order and indorsed in blank, passes by delivery, and *possession* proves *property*, if the holder obtained possession in good faith and for value; and that, as we have seen, the law presumes to be the case, in the absence of evidence which proves the possession to be fraudulent, or, at least, casts suspicion on it.

By the law of England and this country, a sale or transfer of ordinary chattels passes no title to the vendee, if the vendor has none. One cannot convey to another what he himself does not own. Therefore, if a chattel be lost or stolen, or possession of it be obtained by fraud, the owner may retake it wherever he can find it, though it may have passed into the possession of a *bona fide* purchaser for a valuable consideration. But this rule was never applied to *money*, that is, the current coin of the realm. In regard to that the rule always was, that whoever received it in the usual course, in good faith and for a valuable consideration, acquired a perfect title, although the person from whom he received it should have stolen it, or obtained it by fraud, or come to the possession of it by finding. And the reason of this is not, as has sometimes been said,(*b*) that money has no ear-mark, or nothing by which it may be identified. In many cases it can be identified; but the principle applies equally, whether it can be identified or not. The true reason, as said by Lord *Mansfield*, is that it has passed *in currency*.(*c*) In 1758, it

(*b*) See Higgs *v.* Holiday, Cro. Eliz. 746; Maclish *v.* Ekins, Sayer, 73; Ford *v.* Hopkins, 1 Salk. 283.

(*c*) Miller *v.* Race, 1 Burr. 452, 457. Lord *Mansfield* said: "'T is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said, 'That the reason why money cannot be followed is, because it has no *ear-mark*'; but this is not true. The true reason is, upon account of the *currency* of it; it cannot be recovered after it has passed *in currency*. So in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in currency, an action may be brought for the money itself." In Clarke *v.* Shee, Cowp. 197, it was held, that an action for money had and received would lie by the true owner of money or notes against a third person, into whose hands they had come *mala fide*; provided their identity could be traced and ascertained. And Lord *Mansfield* said: "Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example that he should; but otherwise, if they

was decided by Lord *Mansfield*, upon great consideration, that the same principle was applicable to Bank of England notes, payable to bearer, upon the ground that such notes were not goods nor securities nor documents for debts, nor were so esteemed: but were treated as *money*, in the ordinary course and transaction of business, by the general consent of mankind, which gave them the credit and currency of money, to all intents and purposes. They were as much *money* as guineas themselves were, or any other current coin that was used in common payments as money or cash.(*d*) A few years later, Lord *Mansfield* took another step, and applied the same principle to a check upon a banker, payable to bearer, saying, "There is no distinction between a bank-note and such a note as this is."(*e*) And finally, in 1781, he applied the principle to an ordinary bill of exchange, payable to order and indorsed in blank. In this last case, his Lordship said: "I see no difference between a note indorsed blank and one payable to bearer. They both go by delivery, and possession proves property in both cases." (*f*) Questions of this kind must frequently arise in cases where the bill or note was lost or stolen, and in our chapter on a Lost Bill or Note we shall consider these questions, and the authorities which decide them, at much length. The history of this branch of the law is

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cannot be followed and identified, because there it might be inconvenient, and open a door to fraud." Miller *v.* Race, 1 Burr. 452. And in Golightly *v.* Reynolds, the identity was traced through different hands and shops. The case of Golightly *v.* Reynolds, cited by his Lordship, is reported in Lofft, 88. And see, per *Le Blanc*, J., in Glyn *v.* Baker, 13 East, 510; per *Best* and *Holroyd*, JJ., in Wookey *v.* Pole, 4 B. & Ald. 1. See also Le Breton *v.* Pierce, 2 Allen, 14.

(*d*) Miller *v.* Race, 1 Burr. 452. This was an action of trover to recover a Bank of England note. It appeared that the note had been enclosed in a letter and deposited in the mail on the 11th of December, 1756; that on the same night the mail was robbed, and the bank-note in question taken and carried away by the robber; that on the following day it came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of its having been taken out of the mail. On the 13th of December, the former owner, having notice of the robbery, applied to the bank to stop the payment of the note, which was ordered accordingly, upon his entering into proper security to indemnify the bank. Shortly after, the plaintiff applied to the bank for the payment of the note; and for that purpose delivered it to the defendant, who was a clerk in the bank; but the defendant refused either to pay the note or to redeliver it to the defendant. Held, that the plaintiff was entitled to recover.

(*e*) Grant *v.* Vaughan, 3 Burr. 1516.

(*f*) Peacock *v.* Rhodes, 2 Doug. 633.

quite interesting; but all that we will add now is, that the law which applies where a finder or a thief transfers a note for value to an innocent holder, applies equally to every case where an innocent holder receives for value negotiable paper wrongfully transferred.

For more than eighty years there has been a tendency on the part of courts and legislators, perhaps even more on that of the mercantile community, to extend the same principle to other contracts and instruments, upon the ground that they pass *current* in the same manner as negotiable paper, and thus fall within the same reason; and, undoubtedly, wherever this reason certainly exists, it should lead to the same conclusion. Thus, in 1811, the Court of King's Bench having expressed strong doubts whether a *bona fide* purchaser for a valuable consideration of bonds of the East India Company could be protected against a former owner, from whom they had been obtained by fraud or theft, upon the ground that, being choses in action, they were not assignable at law, and so the purchaser acquired no legal title,(*g*) Parliament immediately interfered, and declared that such bonds should be assignable and transferable by delivery of the possession thereof; and upon every such assignment and transfer, the money secured by the bond so assigned or trans-

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(*g*) Glyn *v.* Baker, 13 East, 510. It was stated by *Best, arguendo,* that the bonds of the East India Company were always made payable to their own treasurer, and indorsed by him before they were issued; in which state they were afterwards negotiated, and passed by delivery from one to another. Lord *Ellenborough* said: "If it be meant to liken these to the case of bankers' notes, in Miller *v.* Race, 1 Burr. 452, as having acquired in fact a negotiable quality, and being received as cash; or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market, the fact of such negotiability should be stated. But supposing it were so stated, how could a right of action upon these securities be made to pass by such a practice to the holder of them, where by law no such right passes? There must always be that impediment existing to the legal negotiability of such instruments, which distinguishes them from bills of exchange and securities of that nature in which the legal interest passes, under the law merchant, by indorsement and delivery to another." *Le Blanc,* J.: "It is clear that no action could be brought upon this bond but by Sibley the obligee, or in his name; or if he died, in the name of his executors. Here, then, are persons intrusted with the securities of A and of B, who part with the securities of A, and when called on by him for them, give him the securities of B. That difficulty can only be met by assimilating such securities to cash, which, whether it has an ear-mark set on it or not, if passed by the person intrusted with it to a *bona fide* holder for valuable consideration without notice, cannot be recovered by the original owner; but how does the similitude hold?"

ferred, and the property in such bond, should be absolutely vested in the assignee, as well at law as in equity.(*h*)

A few years later, in a case where an exchequer bill, payable to bearer, had been purchased by the defendant in good faith and for a valuable consideration, it was held that the former owner could not maintain trover, though the bill had been sold to the defendant by a broker, with whom it had been deposited for a special purpose, in violation of his trust; the court holding that such an exchequer bill passed by delivery, and that property and possession were inseparable, as in case of money, bank-notes, and bills of exchange payable to bearer or indorsed in blank.(*i*)

(*h*) 51 Geo. III. ch. 64.

(*i*) Wookey *v.* Pole, 4 B. & Ald. 1. The exchequer bill in this case was payable to ——— or order, and it had a memorandum at the foot, that if the blank were not filled up, it would be paid to bearer. *Best*, J said: "The question which the court is called on to decide is, whether exchequer bills are to be considered as goods, or as the representatives of money; and as such, subject to the same rules, as to the transfer of the property in them, as are applicable to money. The delivery of goods by a person who is not the owner (except in a manner authorized by the owner) does not transfer the right to such goods; but it has been long settled that the right to money is inseparable from the possession of it. I conceive that the representative of money, which is made transferable by delivery only, must be subject to the same rules as the money which it represents. It was said by the court in Higgs *v.* Holiday, Cro. Eliz. 746, 'that where the owner of money had lost the possession of it, he had lost the property in it, because it cannot be known'; and Lord *Holt*, recognizing this doctrine in the case of Ford *v.* Hopkins, 1 Salk. 283, adds, 'But if bank-notes, exchequer notes, million tickets, or the like, are stolen or lost, the owner has such an interest in them as to bring an action into whatsoever hands they are come.' It is not because the loser cannot know his money again that he cannot recover it from a person who has fairly obtained the possession of it; for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a *bona fide* holder. The true reason of this rule is, that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose, the stamp denotes its value, and possession alone must decide to whom it belongs. If this be correct as to money, it must be so as to what is made to represent money; and Lord *Holt* has himself so decided. In an anonymous case, Salk. 126, he held that trover would not lie by one who had lost a bill of exchange against one who had given for it a valuable consideration. The same judgment was given, in the case of a lost bank-note, in Miller *v.* Race, 1 Burr. 452. It cannot be disputed but that this exchequer bill was made to represent money, as much as a bank-note or bill of exchange. It was given for a debt due from government; it is payable (the blank not being filled up) to bearer, and transferable by delivery; and is on its face made current, and to pass in any of the public revenues, or at the receipt of the exchequer. But it has been said, these bills are not used as negotiable instruments, as bank-bills and bills of exchange are, but are the objects of sale. I do not see why they should not be used as negotiable instruments: they are transferred with the same facility as other bills; and I know from the legislature that they may be used in payments, for the statutes direct

The same doctrine was afterwards applied to a Prussian bond, whereby the king of Prussia acknowledged himself and his successors bound *to every person who should for the time being be the holder of the bond*, for the payment of the principal and interest, in the manner therein pointed out.(*j*) And in this

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that they should be received for taxes. We also know that bills of exchange are as frequently sold as they are delivered in payment. It is the business of bill brokers to negotiate these sales. But the great point is, that they are not like goods taken on the credit of the person from whom you receive them, but on that of government. The receiver never inquires from whom they come, further than to satisfy himself that they are genuine bills." *Holroyd*, J., after citing Miller *v.* Race, 1 Burr. 452, Grant *v.* Vaughan, 3 Burr. 1516, and Peacock *v.* Rhodes, 2 Doug. 633, said: "These authorities show, that not only money itself may pass, and the right to it may arise by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in the like manner, by currency or delivery. These decisions proceed upon the nature of the property (viz. money) to which such instruments give the right, and which is itself current; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it. The question then is, whether these principles apply to the present case, or whether this exchequer bill and the right thereto follow the nature of goods, which, except in market overt, can only be transferred by the owner or under his authority. In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns and as to its negotiability or currency by law. In its original state, it purports to entitle the holder to the sum of £1,000 and interest; and the original holder may, if he pleases, secure it to himself; but it is payable to the bearer until some name is inserted; and when that is done, it becomes payable to such nominee or his order. But if the original holder parts with it or keeps it in blank, he by that very act, or by his negligence if he loses it, authorizes the bearer, whoever he may be, to receive the money; and so, if he were to insert his own name, but indorse it in blank, instead of restraining its negotiability, either by not indorsing it at all or by making a special indorsement, he thereby authorizes and empowers any person who may be the holder, *bona fide* and for value, to receive it; and he cannot revoke that authority when it has become coupled with an interest. The instrument is created by the stat. 48 Geo. III. ch. 1, and is thereby made negotiable and current. . . . . An exchequer bill is, therefore, an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money put into circulation and made current by law. It is not, therefore, like goods salable only in market overt, and not otherwise transferable except by the owner, or under his authority, but is, in all those several respects, similar to bills of exchange and promissory notes, and transferable in the same manner as they are. The case, therefore, stands thus: This exchequer bill was a current and negotiable instrument for the payment of money. Now money passes from one person to another, by reason of its currency; and for that reason only, and not because it has no ear-mark, it cannot be recovered from the person to whom it has been passed. The exchequer bill, therefore, seems to me, upon the same principle, to follow the nature of the money for which it is a security." And see Brandão *v.* Barnett, 1 Man. & G. 908, 6 Man. & G. 630, 12 Clark & F. 787.

(*j*) Gorgier *v.* Mieville, 3 B. & C. 45. In Lang *v.* Smyth, 7 Bing. 284, the plaintiff placed in the hands of his agent Neapolitan bonds, with coupons or receipts for half-

country it has been extended to State bonds payable to bearer, and transferable by delivery; (*k*) and in a recent and well-considered case, to railroad bonds payable to bearer.(*l*) Perhaps it is not unreasonable to conjecture that the exigencies of commerce will require the principle to be extended still further. We see no reason why the courts should not to some extent follow the lead of the commercial community upon such a question. It may be said that commercial convenience is the only rational test by which it is to be determined, and of that the commercial community are the best judges. This may be true; and yet it may deserve consideration whether commercial usage alone can so extend the rule that possession proves property to choses in action, which are not assignable at law, as to vest in the assignee a legal title.(*m*)

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yearly interest, payable to the bearer of the coupon: the coupon referred to a certificate, which gave the holder the option of converting his bonds into funded debt; the interest was paid to the holder of the coupon without production of the certificate, but the bonds were never sold in the market without the certificate. Plaintiff kept the certificate in his own hands, but his agent, without authority and fraudulently, pledged the bonds to defendant as a security for a debt. Held, that it was correctly left to the jury to determine whether these instruments passed by delivery, and whether defendant had acted with due caution in receiving the coupons without requiring the certificate; the jury having found both questions in the negative, the court refused to set aside a verdict for plaintiff.

(*k*) Delafield *v.* State of Illinois, 2 Hill, 159. And see Craig *v.* Vicksburg, 31 Missis. 216.

(*l*) Morris Canal & Banking Co. *v.* Fisher, 1 Stockt. Ch. 667. In this case it was held that a *bona fide* purchaser of railroad bonds at a public sale would take a perfect title, although the sale were made by a pledgee, and were unauthorized and illegal, as between him and the pledgor. And see, to the same effect, Carr *v.* Le Fevre, 27 Penn. State, 413. See Mechanics' Bank *v.* New York & N. H. R. Co., 4 Duer, 480, 539, 582.

(*m*) See Glyn *v.* Baker, 13 East, 510. See also Mr. Smith's learned note to Miller *v.* Race, 1 Smith's Lead. Cas. 259. In the case of the exchequer bill and the State bonds, those instruments were issued under the authority of government, and the statute authorizing their issue made them assignable by delivery. So in the case of the Prussian bond, it was doubtless assignable, by the law of Prussia, where it was made, though the point was not directly taken. So also in the case of the railroad bonds, by the law of New Jersey, where the case arose, all bonds are assignable so as to vest in the assignee a legal title. In the recent case of Partridge *v.* Bank of England, 9 Q. B. 396, in the Exchequer Chamber, it was held (reversing the judgment of the Queen's Bench), that a dividend warrant, which was in the form of a check drawn by the Bank of England upon its own cashier, payable to the plaintiff, but which contained no words of negotiability, was not by law assignable, and that usage could not make it so. *Tindal*, C. J., delivering the judgment of the Exchequer Chamber, said: "It is clear that such an instrument will not, by the general law, give any right of action to any person (other than the plaintiff) who might become possessed of it; and it was not contended,

in the argument at the bar, that such right of action existed by the general law. But it was insisted that the usage and custom of merchants and bankers, stated in the pleas, gave such a right of action, and imposed on the defendants the liability to pay the dividends to Messrs. Ladbroke & Company. But we are of opinion that the usage and custom stated has no such operation. It is not necessary to inquire what the effect of a general immemorial custom in a particular place might be, as this usage is not so pleaded, but is described as an usage and custom of bankers and merchants used and approved of for divers, to wit, sixty years, according to which, dividend warrants pass by delivery without indorsement, and the *bona fide* holder thereof is entitled to receive the amount from the defendants, which is rather a practice of trade than a custom properly so called; and such a practice cannot alter the law by which such an instrument does not confer any right of action on an assignee." The Chief Justice then refers to Glyn *v.* Baker, and the note to Smith's Leading Cases which we have above cited, with approbation. But see Carr *v.* Le Fevre, 27 Penn. State, 413, where it is held that a bond, issued by a corporation, payable to bearer, is capable of passing by delivery, so as to vest in the holder a legal title, and enable him to sue upon it in his own name. As to the negotiable qualities of bills of lading, certificates of stock in joint-stock corporations, dock warrants, delivery orders, wharfinger's receipts, &c., see, in addition to cases cited above, Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 297, 319; Saltus *v.* Everett, 20 Wend. 267; Brower *v.* Peabody, 3 Kern. 121; Gurney *v.* Behrend, 3 Ellis & B. 622; Stat. of 18 & 19 Vict. ch. 111; Mechanics' Bank *v.* New York & N. H. R. Co. 4 Duer, 480, 3 Kern. 599; Zwinger *v.* Samuda, 7 Taunt. 265; Lucas *v.* Dorrien, 7 Taunt. 278; Kingsford *v.* Merry, 11 Exch. 577, 1 H. & N. 503.

CHAPTER VI.

OF GUARANTY, AND OF OTHER COLLATERAL AGREEMENTS.

SECTION I.

WHAT GUARANTY IS.

GUARANTY, which was originally but another form of the word warranty, is an undertaking by some one that another shall perform his contract or fulfil his obligation, or that if he does not, the guarantor will do this for him. Now it is plain that this is in effect the contract of every indorser and of every surety. But the law merchant, which creates and defines the law of indorsement, applies this law only to the indorser strictly so called. The contract of guaranty is left to the general law of contracts; and this discriminates in some respects, as we have seen, between the guarantor and the surety, holding the latter for some purposes as making an absolute promise to pay the debt, and the former a conditional promise. We cannot, therefore, define a guarantor of a bill or note any better, than by saying that he is one who engages that the note shall be paid, but is not an indorser nor a surety.(*a*)

(*a*) The character of a guarantor was under the consideration of the court in Oxford Bank *v.* Haynes, 8 Pick. 423, 426. "It is somewhat extraordinary," said *Parker*, C. J., "that the nature of this contract, and the extent of the liability it creates, are not very clearly settled in the books. It has been sometimes held to be an absolute, sometimes a conditional obligation. Sometimes a guarantee has been deemed a surety, and at others, not more than an indorsee. And this perhaps has arisen from the different forms in which the contract has been made. In several cases, where the party put his name on the back of the note, without any words written over it at the time, he not being the payee of the note, he has been charged as an original promisor, being considered in the light of a surety, and he has been declared against as such; but in these cases his signature was given at the time of making the note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally. The case of Josselyn *v.* Ames, 3 Mass. 274, is of the first class, and that of Moies *v.* Bird, 11 Mass. 436, of the second. . . . . That a guarantee differs in

It must be remembered that, while a surety of a note is generally a maker, a guarantor is never a maker. The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it; and the surety may therefore be sued at once as soon as the note is due and dishonored. But the guarantor's promise is always to pay the debt of another. The distinction between the two is slight, as the words are commonly used. But as a matter of law, and in its legal consequences, the distinction is important, and it may be regretted that it has not always been carefully observed by courts.

This engagement or contract of guaranty may be, and often

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character from a surety cannot be questioned, for he cannot be sued as promisor, as the surety may; his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason, and also because he warrants the solveney of the promisor, which the indorser does not, he being answerable on a strict compliance with the law by the holder, whether the promisor is solvent or not." "A guarantor," says Lord *Ellenborough*, "insures as it were the solvency of his principal." Warrington *v.* Furbor, 8 East, 242, 245. "Is the contract," asks *Gamble*, J., in Perry *v.* Barret, 18 Misso. 140, "the legal effect of which is a guaranty of the payment of a note, different from the contract of a surety? When there are no special terms of the guaranty set out, and it is merely alleged that the party became guarantor for the payment of the note, the contract is collateral to the note itself, and binds the guarantor to pay the money specified in the note; if it has been presented to the maker and he has refused to pay it. If the guarantor has not received notice of the dishonor of the note in a reasonable time, he is allowed to use such laches to defend himself against his contract, to the extent that he has been injured by want of the notice." But a surety is liable absolutely, and as an original promisor. In Talbot *v.* Gay, 18 Pick. 534, an indorsement by the payee in these words, "I order the within note paid to T., and guarantee the payment of the same," was held to be one of guaranty only, and that the defendant was not liable as surety. But in Burnham *v.* Gallentine, 11 Ind. 295, a similar indorsement by the payee of a note in these words, "I guarantee the payment of this note, and costs, if any are made on it," was held to render him liable as an absolute promisor. This decision seems to have been founded on some New York cases, which are now overruled in that State. In a case in Tennessee, where the directors of a bank, after discounting a note, acknowledged, in a writing signed and sealed by them, that they had transcended their duty in discounting the note, and that they "consider themselves individually bound for their equal proportion of said debt, should it or any part of it, under any circumstances, be lost to the bank," it was held that the instrument was not a guaranty, but an original contract. Bank of Tennessee *v.* Barksdale, 5 Sneed, 73. An indorsement on the back of a note in these words, "For value received, we jointly and severally undertake to pay the money within mentioned to the said A. B." (the payee of the note), was held to make the indorsers liable as original promisors. White *v.* Howland, 9 Mass. 314. So also Carver *v.* Warren, 5 id. 545. An indorsement with the words, "Holden on the within," made by one not the payee of the note, makes him a joint promisor. Brett *v.* Marston, 45 Maine, 401. So where a party indorsed with the words, "I will see the within paid," he was held as an original promisor. Amsbaugh *v.* Gearhart, 11 Penn. State, 412. Where a

is, written on the back of the note or bill; but it may as well, so far as the guaranty is concerned, be written on a separate piece of paper,(*b*) if it refers to the bill or note in any way which is sufficient to identify it. And this is held to constitute a guaranty of the note, although a part of the description is obviously inaccurate and inapplicable.(*c*)

The contract of guaranty is a separate and independent contract, in most respects at least, and perhaps in all. It is sometimes implied by the law, as if one who, not being a payee, indorses a negotiable note, or if a payee indorses a non-negotiable note in blank.(*d*) There is much diversity of opinion among

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note was written, "We, A as principal, and B as surety, promise," &c, and the note was signed by A and indorsed by B, the latter was held liable as joint maker. Palmer *v.* Grant, 4 Conn. 389. In New York, it was formerly held in several cases where the contract was in express terms a guaranty, that it should be upheld as an original undertaking. See Manrow *v.* Durham, 3 Hill, 584; Lequeer *v.* Prosser, 1 id. 256, 4 id. 420; Miller *v.* Gaston, 2 id. 188; Hough *v.* Gray, 19 Wend. 202; Ketchell *v.* Burns, 24 id. 456; Allen *v.* Rightmere, 20 Johns. 365. But these decisions have since been overruled, and there as elsewhere, where the import of the language used by the indorser is that of guaranty, as when the words, "I guarantee the payment," &c., are used, the contract is interpreted in accordance with its apparent meaning, as strictly one of guaranty. See Brewster *v.* Silence, 4 Seld 207; Oxford Bank *v.* Haynes, 8 Pick. 423. Where a person guaranteed a note good until a specified time, it was held that his undertaking was collateral, and not an absolute engagement to pay the note at the end of the period; and that he was to be considered as agreeing that, during the period mentioned in the guaranty, the makers of the note should be in such a condition that payment of the note could be enforced against them, if legal diligence was used for that purpose; and if at the close of the period the maker were in the open and visible possession of property more than sufficient to pay the note, there was no breach of the guaranty. Hammond *v.* Chamberlin, 26 Vt. 406; Bull *v.* Bliss, 30 id. 127. See also Marsh *v* Day, 18 Pick. 321; Sage *v.* Wilcox, 6 Conn. 81.

(*b*) Shortrede *v.* Cheek, 1 A. & E. 57; Emmott *v.* Kearns, 5 Bing. N. C. 559; Watson *v.* McLaren, 19 Wend. 557, 26 id. 425.

(*c*) Worcester Co. Inst. for Savings *v.* Davis, 13 Gray, 531. The action in this case was upon a guaranty under seal, given by the defendant to the plaintiffs, as follows: "Know all men, that, for value received, and waiving all right to demand and notice, I hereby guarantee to the Worcester County Institution for Savings, or its assigns, the payment, at the office of said institution, of a certain promissory note, hereto annexed, for three thousand dollars, dated Dec. 23d, 1850, signed Alpheus M. Merrifield as principal, and Alpheus Merrifield and Wm. T. Merrifield as sureties, payable on demand, with interest semi-annually. In witness whereof, I have hereunto set my hand and seal, this twentieth day of April, A. D. 1854. Isaac Davis. (Seal.)" Held, that the guaranty could not be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal debtor, and of laches in pursuing him. See also Veazie *v.* Willis, 6 Gray, 90.

(*d*) A blank indorsement, by the payee of a non-negotiable note, has been held to be an absolute guaranty, as in Seymour *v.* Van Slyck, 8 Wend. 403, 421. In Jos-

the courts of the different States, as to the nature of the contract to be implied from the blank indorsement of one not a party to the bill or note, when the paper is negotiable, and the indorsement is made before its delivery to the payee. In some States, one indorsing in such manner is *prima facie* regarded as a guarantor; (*e*) in others, as an indorser; (*f*) and in others, as

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selyn *v.* Ames, 3 Mass. 274, the plaintiff wrote a guaranty over the blank indorsement of the payee; but the court held that he could not recover upon that, but might cancel the words written, and substitute, "For value received, I undertake to pay the money within mentioned to E. J." The court seem to have regarded the defendant liable on such indorsement as an original promisor. In Tryon *v.* De Hay, 7 Rich. 12, it was held, that where the payee transfers a sealed note, and writes his name upon it in blank, such indorsement, without more, imports merely an assignment of the note, and not a guaranty also. And it is the rule in South Carolina, that no liability is incurred upon a simple indorsement by the payee of any instrument, without negotiable words. Wilson *v.* Mullen, 3 McCord, 236; Benton *v.* Gibson, 1 Hill, S. Car. 56, 58; Pratt *v.* Thomas, 2 id. 654, 656. So in Tennessee, Whiteman *v.* Childress, 6 Humph. 303. See also Parker *v.* Riddle, 11 Ohio, 102; Aldis *v.* Johnson, 1 Vt. 136.

(*e*) As in Illinois, Webster *v.* Cobb, 17 Ill. 459; Klein *v.* Currier, 14 id. 237; Carroll *v.* Weld, 13 id. 682; Camden *v.* McKoy, 3 Scam. 437; Cushman *v.* Dement, id. 497; Smith *v.* Finch, 2 id. 321. In Ohio, Robinson *v.* Abell, 17 Ohio, 36; Greenough *v.* Smead, 3 Ohio State, 415. In Texas, Carr *v.* Rowland, 14 Texas, 275; Cook *v.* Southwick, 9 id. 615. In Virginia, Watson *v.* Hart, 6 Gratt. 633. In Connecticut, Clark *v.* Merriam, 25 Conn. 576; Beckwith *v.* Angell, 6 id. 315; Perkins *v.* Catlin, 11 id. 213; Ranson *v.* Sherwood, 26 id. 437. These cases in Connecticut hold that such indorsement in blank *prima facie* implies a contract on the part of the indorser that the note is due and payable according to its tenor, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence. In Pennsylvania, it is held, that, where a negotiable note is indorsed by one not a party to it, the presumption from the paper is, that he indorsed as second indorser for the accommodation of the prior parties, and no liability would attach to him so long as the note remains in the hands of the payee; but when made at the request of the payee, who acts upon the faith of it, it imparts a guaranty. Schollenberger *v.* Nehf, 28 Penn. State, 189. The rule adopted in Ohio differs from that which prevails in Massachusetts in this, that in the former State a stranger indorsing in blank is presumed to be a guarantor; in the latter State he is presumed to be an original promisor. But in Ohio such person may be charged as maker upon proof that his indorsement was made at the time of execution by the other party, or if afterward, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. In Massachusetts, the indorsement is presumed to have been made at the time of the execution of the note; so that the difference in fact is only one as to the presumption of the time of the indorsement, though it has not been so stated in the Ohio decision. See Greenough *v.* Smead, *supra*.

(*f*) As in New York, Spies *v.* Gilmore, 1 Comst. 321; Ellis *v.* Brown, 6 Barb. 282; Waterbury *v.* Sinclair, 26 id. 455; Cottrell *v.* Conklin, 4 Duer, 45. These decisions overrule the earlier ones in this State, holding such indorser liable as an original promisor. See Herrick *v.* Carman, 12 Johns. 159; Campbell *v.* Butler, 14 id. 349. In Indiana, Wells *v.* Jackson, 6 Blackf. 40; Cecil *v.* Mix, 6 Ind. 478; Vore *v.* Hurst, 13

a joint promisor or surety.(*g*) But in most of the States, the effect of such an indorsement is held to depend upon the intention of the parties, which may be ascertained by parol evidence.(*h*) In Massachusetts, however, the presumption is said

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id. 551. In Tennessee, Camparree *v.* Brockway, 11 Humph. 355; Clouston *v.* Barbiere, 4 Sneed, 336. In Iowa, Fear *v.* Dunlap, 1 Greene, 331. In California, such party is called a guarantor, but his liability is the same as that of an indorser. Riggs *v.* Waldo, 2 Calif. 485; Pierce *v.* Kennedy, 5 id. 138. Mississippi, Jennings *v.* Thomas, 13 Smedes & M. 617, 5 id. 627.

(*g*) In Massachusetts, Baker *v.* Briggs, 8 Pick. 122, 130; Tenney *v.* Prince, 4 id. 385; Austin *v.* Boyd, 24 id. 64; Hawkes *v.* Phillips, 7 Gray, 284; Draper *v.* Weld, 13 id. 580; Union Bank *v.* Willis, 8 Met. 504. In this last case the previous cases on this subject in Massachusetts are carefully reviewed. Maine, Irish *v.* Cutter, 31 Maine, 536; Leonard *v.* Wildes, 36 id. 265; Malbon *v.* Southard, id. 147; Childs *v.* Wyman, 44 id. 433; Adams *v.* Hardy, 32 id. 339. Vermont, Nash *v.* Skinner, 12 Vt. 219; Sylvester *v.* Downer, 20 id. 355. New Hampshire, Martin *v.* Boyd, 11 N. H. 385. Missouri, Powell *v.* Thomas, 7 Misso. 440; Lewis *v.* Harvey, 18 id. 74; Perry *v.* Barret, id. 140; Schneider *v.* Schiffman, 20 id. 571. South Carolina, Stoney *v.* Beaubien, 2 McMullan, 313; Baker *v.* Scott, 5 Rich. 305; Carpenter *v.* Oaks, 10 id. 17. In Louisiana, such party is regarded as a surety. McGuire *v.* Bosworth, 1 La. Ann. 248; Penny *v.* Parham, id. 274. The principle upon which one not the payee signing negotiable paper in blank upon the back of it is charged as a promisor, if he does this at the time the note is made, is stated by Mr. Justice *Parker*, in Moies *v.* Bird, 11 Mass. 436, 440. In Lewis *v.* Harvey, 18 Misso. 74, *Gamble*, J., delivering the opinion of the court, said: "We think the strength of argument is decidedly opposed to the conclusion that the party who puts his name upon the back of a note to which he is not a party, whether it be negotiable or not, is to be held only as an indorser. We think that he is to be taken to have assumed the obligation arising from the act of putting his name upon paper as it then was, and upon which he could not then be an indorser. Shall he, then, be held to be a guarantor or a maker? In the absence of all extrinsic evidence, it is but giving effect to his signature to allow the holder to treat him as a maker, for that is the effect most beneficial to the holder, and is entirely consistent with the meaning of his signature."

(*h*) Clark *v.* Merriam, 25 Conn. 576; Schollenberger *v.* Nehf, 28 Penn. State, 189; Carroll *v.* Weld, 13 Ill. 682; Cottrell *v.* Conklin, 4 Duer, 45; Lewis *v.* Harvey, 18 Misso. 74; Barrows *v.* Lane, 5 Vt. 161; Knapp *v.* Parker, 6 Vt. 642; Sandford *v.* Norton, 14 Vt. 228; Flint *v.* Day, 9 Vt. 345; Sylvester *v.* Downer, 20 Vt. 355; Beckwith *v.* Angell, 6 Conn. 315; Perkins *v.* Catlin, 11 Conn. 213; Champion *v.* Griffith, 13 Ohio, 228; Robinson *v.* Abell, 17 Ohio, 36; Greenough *v.* Smead, 3 Ohio State, 415; Jennings *v.* Thomas, 13 Smedes & M. 617, 5 Smedes & M. 627; Fear *v.* Dunlap, 1 Greene, Iowa, 331; Patterson *v.* Todd, 18 Penn. State, 426. This question is discussed at length in Perkins *v.* Catlin, 11 Conn. 213, by *Huntington*, J., who said: "The indorsement is not controlled by the oral testimony, but completed according to the manifest intention of the parties. The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made." Thus, where a party guaranteed a note "good," it may be shown that the plaintiff took the note under an express agreement that the plaintiff should run his own risk as to the solvency of the maker, the plaintiff saying, previous to the signing of the guaranty, that it was only a guaranty, that the note was not paid, or that it was

to be conclusive, that the party indorsing in this manner intends to become liable as an original promisor, and parol evidence is not competent to vary that liability, and show that the real agreement was that he should be liable only as an indorser or as a guarantor ; (*i*) and especially as against a party who has taken the note without notice of any modification of this liability implied by law, evidence will not be received tending to vary that liability.(*j*) If the note is payable to the maker or his order, and indorsed by the maker, a person who puts his name on it after the maker, but before delivery to a third party, is liable

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genuine, though knowing at the time that it was of different legal effect, and that the defendant was ignorant of the legal effect of it, and relied upon the plaintiff's representation. Cooke *v.* Nathan, 16 Barb. 343. See in this connection, the remarks of *Waite*, J., in Castle *v.* Candee, 16 Conn. 223.

(*i*) In Wright *v.* Morse, 9 Gray, the defendant, whose name was on the back of the note, and who was not the payee, offered to show that at the time he signed the note it was agreed by the plaintiff, the payee of the note, and the defendant, that if the maker of the note should arrive safely in California, the defendant was to be released, and the plaintiff was not to look to the defendant for the payment of the note, and that the defendant was only a guarantor, that, if the maker should arrive safely at California, then the plaintiff was to get his money from the maker. Held inadmissible. See also Essex Co. *v.* Edmands, 12 Gray,

(*j*) Draper *v.* Weld, 13 Gray, 580. In this case the defendant, in order to show that he put his name on the back of the note with authority to fill up the blank with a guaranty only, offered evidence of what was said by one who had signed it on its face, to induce him to sign it on the back ; but it was held that any limitation of the authority to fill up the blank could not affect the right of the plaintiff, to whom it was passed in that condition, to recover against him as an original promisor. And so in Schneider *v.* Schiffman, 20 Misso. 571, Mr. Justice *Leonard*, delivering the opinion of the court, said : " Negotiable paper, it is said, carries its own history upon its face, so that nothing can be alleged against it, while it continues in circulation undishonored, as against an innocent purchaser, other than what is there apparent. This defendant has placed his name upon the note in such position as, under our law, to impose upon himself the obligations of a maker, and he is irrevocably bound as such to all who take the note for value and without notice, upon the faith of what they find upon it, although it is otherwise with reference to those who are bound by the real transaction between the parties. It is no answer to this to say that it was the duty of the holder, when he saw the position of the defendant's name upon the note, to have inquired into the matter, and satisfied himself before he took it whether the party was to be considered chargeable as maker, or only as indorser. The policy of the law in reference to negotiable paper requires that it shall tell its own story, and have effect in the hands of innocent holders for value according to what appears upon it." The words, " without recourse," written under the signature of one not the payee, upon the back of a note, can have no legal effect, and are rejected as surplusage. Childs *v.* Wyman, 44 Maine, 433 ; Lowell *v.* Gage, 38 id. 35. So with the words " responsible without demand or notice," added to such indorsement. Malbon *v.* Southard, 36 id. 147.

only as an indorser, and not as a joint maker.(*k*) And parties who indorse their names on a promissory note before its delivery, for the benefit of the maker, are not liable as joint makers, if the payee afterwards indorses his name above theirs before the note is delivered, and parol evidence is inadmissible to show that they were joint makers.(*l*) And if several persons indorse their names on a note, to enable the maker to get it discounted, and some of them afterwards, on failure of the maker, pay the note, they cannot maintain an action against the others for contribution, without proving that the relation between them was really that of co-sureties. But parol evidence of that fact will maintain such action.(*m*)

In New York, the later cases seem to go to the extent of holding that a party indorsing in blank is conclusively presumed to be liable only as an indorser, in the full legal sense of the term, and, whatever may have been the intent, his engagement cannot be converted into a guaranty, or any other or different contract whatever.(*n*) Where the blank indorsement of a person other than the payee appears upon the note after the name of the payee, parol evidence will not be permitted to vary the legal effect of his contract as a second indorser, although he was privy to the consideration between the princi-

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(*k*) Bigelow *v.* Colton, 13 Gray, 309; Lake *v.* Stetson, id. 310, note.

(*l*) Clapp *v.* Rice, 13 Gray, 403.

(*m*) Clapp *v.* Rice, 13 Gray, 403.

(*n*) Spies *v.* Gilmore, 1 Comst. 321. In this case, *Bronson*, J. said: "There are a few cases in the books which hold, in effect, that a written contract of one kind may be turned into a contract of a different kind by parol proof concerning the intention of the parties; that the indorser of a promissory note may, under certain circumstances, be charged as maker or guarantor; and that the guarantor of a promissory note may sometimes be charged as maker or indorser. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The Court of Errors was at first equally divided on the question; but after a second argument, the court decided by a pretty strong vote to uphold contracts as they had been made by the parties, instead of making new contracts for them." See Hall *v.* Newcomb, 3 Hill, 233, 7 id. 416; Seabury *v.* Hungerford, 2 Hill, 80; Manrow *v.* Durham, 3 Hill, 584, per *Bronson*, J. In Cottrell *v.* Conklin, 4 Duer, 45, *Campbell*, J., remarking upon the above cases, said: "We assent entirely to the observations of Justices *Bronson* and *Jewett*, that the doctrine, which the earlier cases strongly favored, that the indorser of a promissory note may under certain circumstances be charged as maker or guarantor, and the guarantor as maker or indorser, stood upon no ground of principle, and must now be regarded as corrected and exploded." And see Vore *v.* Hurst, 13 Ind. 551.

pal parties to the note, and signed at the time of the execution of it.(*o*)

If, however, the blank indorsement is not a part of the original transaction, but is made at a subsequent period as a distinct transaction, the indorser is not treated as an original promisor, but as a guarantor; (*p*) but while the note is in the hands of the payee, the indorsement of a third person in blank is presumed to have been placed there at the time of the execution of the note,(*q*)

(*o*) Vore *v.* Hurst, 13 Ind. 551; Howe *v.* Merrill, 5 Cush. 80.

(*p*) Benthall *v.* Judkins, 13 Met. 265; Mecorney *v.* Stanley, 8 Cush. 85; Union Bank *v.* Willis, 8 Met. 504; Tenney *v.* Prince, 4 Pick. 385; Colburn *v.* Averill, 30 Maine, 310; Irish *v.* Cutter, 31 Maine, 536. In Tenney *v.* Prince, 4 Pick. 385, it appeared that the defendant put his name in blank on the back of the note, about nine months after its date, and three months before it became due. There was no evidence of the purpose of this act, nor of any consideration for it. The plaintiff wrote over his signature an engagement which would make him liable as an original promisor. Mr. Chief Justice *Parker*, expressing the opinion of the court, that it was impossible to infer an original promise to pay the note, coeval with its date, from a signature put upon it nine months after, and not in accordance with any agreement made at that time, continued: "But this signature is not without effect; it was intended as security to the plaintiff, and it ought to avail as intended. The only form of engagement which is consistent with the time and circumstances under which the signature was made, is a guaranty of the payment of the note when it should become due, and that is a contract which may be enforced, if it was made on legal consideration, and not otherwise. If within the statute of frauds, it is sufficiently in writing, with the engagement to that effect, which the plaintiff is authorized to place over the signature, to be sustained. But whether within the statute or not, it cannot avail the plaintiff, without proof of consideration, because it is a collateral, not an original undertaking. We think the signature conveys the authority to superscribe this engagement, as was decided in 1801, in a case reported in a note to Precedents of Declarations, 2d ed., 150, afterwards in Josselyn *v.* Ames, 3 Mass. 274, Ulen *v.* Kittredge, 7 Mass. 233, and many other subsequent cases. The action, in its present form, therefore, cannot be maintained; but if it is supposed that a consideration can be proved, the plaintiff has leave to amend his declaration and his indorsement over the signature, and a new trial is granted." In Vermont it is held, that one, not otherwise a party to a note, writing his name upon the back of it, becomes liable as a maker, although he do this a long time after the making of the note. Flint *v.* Day, 9 Vt. 345; Strong *v.* Riker, 16 Vt. 554; Sylvester *v.* Downer, 20 Vt. 355. In the latter case, *Redfield*, J. said: "What this court has repeatedly held upon this subject is, that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he do this long after the making of the note, it shall make no difference; if he consent to be thus bound, and induce others to take the note under that expectation, he shall be estopped to deny that fact, and is treated to all intents the same, precisely, as if he had signed the note in its inception. But the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation."

(*q*) Benthall *v.* Judkins, 13 Met. 265; Colburn *v.* Averill, 30 Maine, 310; Lowell *v.* Gage, 38 Maine, 35; Clark *v.* Merriam, 25 Conn. 576; Webster *v.* Cobb, 17 Ill. 459;

and parol evidence is always admissible to show when the signature was made.(*r*)

In those States where the rule is adopted that a third person indorsing paper in blank before the delivery of it to the payee is liable as an indorser only, it is not applied in case the paper be not negotiable, inasmuch as a legal indorsement can only be made on negotiable paper; but the indorser in such case is held liable as a maker or guarantor.(*s*) So, as there can be but one acceptor, a second acceptor is regarded as a guarantor only; (*t*) and, as we should hold, as a guarantor of the acceptor. Then the question might arise, To whom does he guarantee the payment of the bill? and we answer, To the payee, and to him only. There may, however, be many makers of a note, and a second maker will be held rather as a joint and several promisor, or as a surety, than as a guarantor.(*u*)

As a guaranty is an independent contract, it must be made upon sufficient consideration. This may be the same consideration for which the note or bill is given, and will be presumed to be the same if the guaranty and the making are simultaneous; (*v*)

Camden *v.* McKoy, 3 Scam. 437; Carr *v.* Rowland, 14 Texas, 275; Klein *v.* Currier, 14 Ill. 237; Childs *v.* Wyman, 44 Maine, 433.

(*r*) Draper *v.* Snow, 20 N. Y. 331, per *Selden*, J.

(*s*) Griswold *v.* Slocum, 10 Barb. 402; Seabury *v.* Hungerford, 2 Hill, 80; Hall *v* Newcomb, 3 Hill, 233, 7 id. 416; Cooley *v.* Lawrence, 4 Mart. La. 639.

(*t*) Jackson *v.* Hudson, 2 Camp. 447.

(*u*) In Partridge *v.* Colby, 19 Barb. 248, the action was on a note payable to A or bearer, which the payee before maturity offered to the plaintiff in part payment of a horse; but the plaintiff refusing to receive it, unless the payee would indorse it, or guarantee the payment, or put his name upon it, the payee signed his name under the maker's, and delivered the note to the plaintiff. It was held, that he thereby made himself jointly liable as maker with the original maker, and that an action could be maintained against both. And in Tiller *v.* Shearer, 20 Ala. 596, it was held that a party signing a note after due below the maker's name was liable as maker. See Ex parte Yates, 2 De Gex & J. 191.

(*v*) Bickford *v.* Gibbs, 8 Cush. 154; Colburn *v.* Averill, 30 Maine, 310; Gillighan *v.* Boardman, 29 Maine, 79; Simons *v.* Steele, 36 N. H. 73; per *Selden*, J., in Draper *v.* Snow, 20 N. Y. 331; per *Nelson*, C. J., in Manrow *v.* Durham, 3 Hill, 584; Klein *v.* Currier, 14 Ill. 237; Rich *v.* Hathaway, 18 Ill. 548; Higgins *v.* Watson, 1 Mich. 428; Campbell *v.* Knapp, 15 Penn. State, 27; and see Leonard *v.* Vredenburgh, 8 Johns. 29; Bailey *v.* Freeman, 11 id. 221; Leggett *v.* Raymond, 6 Hill, 639; 2 Smith's Lead. Cases, 156. In Bickford *v.* Gibbs, 8 Cush. 154, objection was made, that a distinct consideration should be proved. "There would be force in this objection," said *Shaw*, C. J., "had the guaranty been made after the note had been made, delivered, and received as a complete contract. But when the guaranty is made on the

and may be so presumed if the guaranty is made at a later date, but after such request, and under such circumstances, as may make it relate back to the making of the note, as a mere fulfilling of a contract, then entirely made, although not written at that time.(*w*)

But if the guaranty, however made, is made after the original consideration is exhausted, there is no doubt that there must be a new and sufficient consideration.(*x*) And where the defendant shows that he executed the guaranty after the delivery of the note, the fact that this execution was not previous to or contemporaneous with the delivery of the note rebuts any presumption of consideration, and the burden is on the plaintiff of showing a new and express consideration.(*y*) But if the guaranty be under seal, this, of course, implies consideration.(*z*) And if it be under seal, and the consideration is said to be one dollar, and this dollar was never paid, it is still good.(*a*) The consideration may be anything which the law would regard as sufficient to sustain a promise. So far as it may be connected with the bill or note which is the subject of the guaranty, it may be said that an agreement on the part of the holder of a bill or note to forbear to sue is a sufficient consideration for a guaranty of it,(*b*) though a mere forbearance to sue, without any such agreement, is not.(*c*)

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note before its delivery by the maker to the promisee, it must be deemed to be done for the benefit of the maker, to add to the strength of the note, and to induce the promisee to take it and advance his money on it; and no other consideration is necessary than the credit thus given to the maker. And the guaranty being without date, and there being no direct proof of any time at which it was made, we think the court were right in leaving it to the jury to find that the guaranty was simultaneous with the note itself."

(*w*) Hawkes *v.* Phillips, 7 Gray, 284; Moies *v.* Bird, 11 Mass. 436; Leonard *v.* Wilkes, 36 Maine, 265.

(*x*) Ware *v.* Adams, 24 Maine, 177; White *v.* White, 30 Vt. 338; Klein *v.* Currier, 14 Ill. 237.

(*y*) Klein *v.* Currier, 14 Ill. 237.

(*z*) Crocker *v.* Gilbert, 9 Cush. 131, 134; Bank of Tennessee *v.* Barksdale, 5 Sneed. 73, per *Caruthers, J.*; Childs *v.* Barnum, 11 Barb. 14.

(*a*) Childs *v.* Barnum, 11 Barb. 14.

(*b*) Emmott *v.* Kearns, 5 Bing. N. C. 559; Elton *v.* Johnson, 16 Conn. 253; Sage *v.* Wilcox, 6 Conn. 81; Russell *v.* Babcock, 14 Maine, 138; Harwood *v.* Kiersted, 20 Ill. 367. It was said in this last case that the facts showing an intention to bring suit, and a forbearance to do so, need not appear by express agreement, but may appear as well by implication from the circumstances, the declarations and acts of the parties

(*c*) Mecorney *v.* Stanley, 8 Cush. 85. See Russell *v.* Buck, 11 Vt. 166, 14 Vt. 147;

Not only must there be a sufficient and valid consideration for the guaranty, but when the contract is collateral, and falls within the provisions of the Statute of Frauds, as an agreement to answer for the debt, default, or miscarriage of another person, it must be in writing, and, according to the English doctrine, an adequate consideration must also appear, either by express word or by just implication, upon the face of the instrument itself. In favor of this construction it is said, that, to attain the avowed object of the statute, namely, the prevention of perjury, it is quite as essential that the consideration of the contract should appear in writing, as that any other term or condition of it should so appear; and moreover, that, as the statute requires the agreement to be in writing, the rule of evidence, that no parol testimony shall be admitted to vary or add to the terms of a written instrument, renders it necessary that the whole agreement should appear in writing.(*d*)

Crofts *v.* Beale, 11 C. B. 172; Walker *v.* Sherman, 11 Met. 170; Breed *v.* Hillhouse, 7 Conn. 523. In Johnson *v.* Wilmarth, 13 Met. 416, the court thought that an agreement to forbear a suit might be inferred from the facts of the case, and the guaranty was supported on that consideration.

(*d*) This construction was first put upon the statute in the case of Wain *v.* Warlters, 5 East, 10, decided in 1804. The plaintiffs declared on an undertaking which it was alleged the defendant entered into in consideration that the plaintiffs would forbear to proceed at law against the drawer and acceptor of a bill of exchange for the recovery of £56 16*s.* 6*d.*, the amount of the bill. In support of the declaration, a writing was produced, in these words: "Messrs. Wain & Co., I will engage to pay you, by half past four this day, fifty-six pounds and expenses on bill that amount on Hall (the drawee). (Signed,) Jno. Warlters, No. 2 Cornhill. April 30th, 1803." It was objected, on the part of the defendant, that the writing did not express the consideration of the defendant's promise; that this omission could not be supplied by parol evidence; and that consequently it was *nudum pactum*, and gave no cause of action. Lord *Ellenborough*, C. J. was of this opinion, and therefore nonsuited the plaintiffs. Upon a rule *nisi*, the same eminent judge, in the Court of King's Bench, after noticing the word *agreement*, and speaking of the known accuracy of Sir Matthew Hale, who was supposed to have drawn the statute, said: "The person to be charged for the debt of another, is to be charged in the form of the proceeding against him upon his special promise; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word *promise* being used in the first part of the clause; but still, in order to charge the party making it, the statute proceeds to require that the agreement, by which must be understood the agreement in respect of which the promise was made, must be reduced into writing." *Grose*, *Lawrence*, and *Le Blanc*, JJ. concurring, the rule was discharged. Another leading case is Morley *v.* Boothby, 3 Bing. 107. This was an action upon an agreement to this effect: "Messrs. Morley

This construction is not universally adopted in the United States,(*e*) and in some States it is now provided by statute that the consideration need not be set forth in the writing, but may be proved by any other legal evidence.(*f*) But in some States the English doctrine has been adopted by judicial authority, and also recognized by statute; (*g*) although the authorities in these States show various departures from the strict interpretation given in the English courts.

Thus it has been held, that, if the original contract and the guaranty are made at the same time, and the guaranty thus becomes an essential ground of the credit given to the principal debtor, it is not necessary to show any other consideration than that moving between the parties to the original contract; and that, whether the guaranty be on the same or a separate paper, it need not disclose any distinct consideration. This was the con-

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& Co. We hereby promise that your draft on William Clarke, Son, & Co., due at Messrs. Masterman's, at six months, on the 27th of November next, shall be then paid out of money to be received from St. Philip's Church, say amount £ 174 13*s.* 5*d.* W. Clarke, W. Boothby." The undertaking was held void, no consideration appearing in writing for the promise. See also Jenkins *v.* Reynolds, 3 Brod. & B. 14; Newbury *v.* Armstrong, 6 Bing. 201; Allnutt *v.* Ashenden, 5 Man. & G. 392; Hawes *v.* Armstrong, 1 Bing. N. C. 761, 1 Scott, 661, Hodges, 179.

(*e*) This interpretation was rejected by the Supreme Court of Massachusetts, in the case of Packard *v.* Richardson, 17 Mass. 122, *Parker*, C. J. delivering a very elaborate opinion. Remarking that the construction adopted in Wain *v.* Warlters, 5 East, 10, is based upon the technical import of the term *agreement*, *Parker*, C. J. thought too much stress was laid upon this source of argument. See also Reed *v.* Evans, 17 Ohio, 128, per *Birchard*, C. J. This last construction is adopted in Maine. Levy *v.* Merrill, 4 Greenl. 180; Cummings *v.* Dennett, 26 Maine, 397; Gillighan *v.* Boardman, 29 Maine, 79. In Vermont, Smith *v.* Ide, 3 Vt. 290. So in Connecticut, Sage *v.* Wilcox, 6 Conn. 81. Ohio, Reed *v.* Evans, 17 Ohio, 128. So in New Jersey, Buckley *v.* Beardslee, 2 Southard, 570. In North Carolina, Miller *v.* Irvine, 1 Dev. & B. 103; Ashford *v.* Robinson, 8 Ired. 114. In Mississippi, Wren *v.* Pearce, 4 Smedes & M. 91. Missouri, Little *v.* Nabb, 10 Misso. 3.

(*f*) Gen. Stats. of Massachusetts, 1860, ch. 105, § 2; Rev. Stats. of Kentucky (Stanton's ed.), 1860, Vol. I. p. 265, ch. 22, § 1; Rev. Stats. of Indiana, 1852, Vol. I. p. 300; Rev. Stats. of Maine, 1857, p. 631, ch. 111, § 2; Compiled Laws of Michigan, 1857, Vol. II. p. 913.

(*g*) It is adopted in New York, first by adjudication. Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburgh, 8 Johns. 29. It is now provided by statute that the consideration shall be expressed. 2 R. S., 4th ed., p. 317. And so in Alabama, Code, 1852, § 1551; and California, Wood's Dig. 1858, p. 106. See Rigby *v.* Norwood, 34 Ala. 129; Simons *v.* Steele, 36 N. H. 73. So by adjudication in Maryland and Georgia. Elliott *v.* Giese, 7 Harris & J. 457; Wyman *v.* Gray, id. 409; Henderson *v.* Johnson, 6 Ga. 390. And see cases in New Jersey, Buckley *v.* Beardslee, 2 Southard, 570, Laing *v.* Lee, Spencer, 337.

struction formerly given to the statute by the courts of New York ; (*h*) but since the alteration of the statute in that State so as to require the consideration to be expressed in writing, a more strict interpretation has been given to the statute, and it is now held that a contract, to guarantee the payment of a promissory note, although made simultaneously with the note, and written upon the same paper, and upon a consideration advanced on the credit of the guarantor, conformably to a previous understanding, must express the consideration upon which it is made, or it will be void.(*i*) This seems to be the settled law of the State, although various efforts have been made, at different times, to avoid or qualify this interpretation.(*j*)

(*h*) Leonard *v.* Vredenburgh, 8 Johns. 29. The doctrine of this case is recognized in Bailey *v.* Freeman, 11 Johns. 221 ; Nelson *v.* Dubois, 13 Johns. 175; and it is approved in D'Wolf *v.* Rabaud, 1 Pet. 476. It is adopted in California. Riggs *v.* Waldo, 2 Calif. 485.

(*i*) Brewster *v.* Silence, 11 Barb. 144 ; s. c., in the Court of Appeals, 4 Seld. 207. This was an action upon a guaranty of a promissory note which was given for value received, in the following words, written beneath the note, namely : " I hereby guarantee the payment of the above note." The note and guaranty were signed simultaneously, and the consideration was advanced upon the credit of the guarantor, conformably to a previous agreement. But it was decided that the guaranty was void. In a later case, upon a like guaranty, the Supreme Court reluctantly submit to the authority of the above case. Glen Cove Mut. Ins. Co. *v.* Harrold, 20 Barb. 298. And in Draper *v.* Snow, 20 N. Y. 331, decided in the Court of Appeals, in 1859, the principle involved in Brewster *v.* Silence was fully adopted by the court, Justice *Strong* dissenting. In this case the principal contract and the guaranty were executed at the same time, upon the same paper, and to the same promisee ; and it was insisted by the plaintiff's counsel that they should " be deemed to have been parts of the same transaction ", and that " the two instruments may be read together as one contract." But *Selden*, J., delivering the opinion of the court, said, that in order to be read together as one contract, they must be between the same parties, and it was not sufficient that they were executed to the same party ; and that the guaranty could not be sustained under the Statute of Frauds, unless it referred expressly, or by clear implication, to the consideration expressed in the principal, as that of the collateral undertaking.

(*j*) In Manrow *v.* Durham, 3 Hill, 584 ; s. c., in the Court of Appeals, 2 Comst. 533, a pre-existing note was transferred by the payee for a valuable consideration, on which, contemporaneously with the transfer, the payee and another indorsed the following guaranty : " We guarantee the payment of the within note." The majority of the Supreme Court held the guaranty to be in effect a promissory note, importing a consideration, and not within the Statute of Frauds. In the Court of Appeals, there being no legal majority for a reversal, the decision of the Supreme Court was affirmed. The dissenting judges in both courts considered the guaranty a collateral undertaking, and void within the Statute of Frauds, for want of a consideration in writing. But in another case, where a note was made by debtors payable to the order of a third person, to be transferred in payment of a pre-existing debt, and, at the time of the making and transfer, the third person to whom the order was payable indorsed on

It seems, however, that, although the consideration must be *expressed*, it need not be *defined;* and therefore it is a sufficient expression of the consideration if the guaranty is stated on its face to be for *value received;* (*k*) and it is sufficient if the consideration is so expressed, or so far defined, that it must be necessarily inferred that such, and no other, consideration was intended by the parties to be the ground of the promise.(*l*)

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the note a guaranty of the payment thereof, it was held that the undertaking was collateral and void within the statute, because the consideration was not expressed in writing. Hall *v.* Farmer, 5 Denio, 484, 2 Comst. 553. The Court of Appeals was divided on this case. In Lequeer *v.* Prosser, 1 Hill, 256, a guarantor was converted into a joint maker of a note; and in Oakley *v.* Boorman, 21 Wend. 588, a contract of guaranty was upheld by calling it an indorsement, thus dispensing with the necessity of expressing the consideration. In several other cases, in New York, where the contract indorsed upon the note was in express terms a guaranty, it was construed as an original undertaking. Hough *v.* Gray, 19 Wend. 202; Miller *v.* Gaston, 2 Hill, 188; Allen *v.* Rightmere, 20 Johns. 365; Ketchell *v.* Burns, 24 Wend. 456. These cases, however, have since been disapproved in the same State, in Brewster *v.* Silence, 4 Seld. 207, and subsequent cases.

(*k*) Per *Willard*, J., in Brewster *v.* Silence, 4 Seld. 207; Watson *v.* McLaren, 19 Wend. 557, 26 id. 425; Douglass *v.* Howland, 24 id. 35; Miller *v.* Gaston, 2 Hill, 188; Manrow *v.* Dunham, 3 id. 584; Cooper *v.* Dedrick, 22 Barb. 516; Day *v.* Elmore, 4 Wisc. 190; Hart *v.* Hudson, 6 Duer, 294.

(*l*) Hawes *v.* Armstrong, 1 Bing. N. C. 761, 1 Scott, 661; Rogers *v.* Kneeland, 10 Wend. 218; Simons *v.* Steele, 36 N. H. 73; Edwards *v.* Jevons, 8 C. B. 436. In Emmott *v.* Kearns, 5 Bing. N. C. 559, where the plaintiff, having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to the plaintiff a bill accepted by W. at two months, enclosed in a letter, in which the defendant said, "W. being again disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I enclose you his acceptance at two months"; and the plaintiff refusing to take the bill unless defendant put his name to it, the defendant wrote on the back of the letter, "I will see the bill paid for W." It was held that the consideration (the forbearing to sue) sufficiently appeared upon the guaranty, and that the defendant was liable. And so it seems that an agreement in the following words is sufficient: "In consideration of your being in advance to Messrs. Lees and Sons in the sum of £ 10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. Brooks." Haigh *v.* Brooks, 10 A. & E. 309. Lord *Denman*, C. J., in delivering the judgment of the court, said: "It was argued for the defendant, that this guaranty is of no force, because the fact of plaintiff's being already in advance of Lees could form no consideration for defendant's promise to guarantee to plaintiff the payment of Lees's acceptances. In the first place, this is by no means clear. That 'being in advance' must necessarily mean to assert that he was in advance at the time of giving the guaranty is an assertion open to argument. It may possibly have been intended as prospective." At all events, the plaintiff's giving up such guaranty was a sufficient consideration for the defendant's promise to see certain acceptances paid. The court said they had no concern with the adequacy or inadequacy of the price paid or promised for the guaranty, unless actual fraud were imputed. So, where A wrote to B, "You will be so good as to withdraw the promissory note, and I will see you at Christmas,

In those States where the consideration is not required to be expressed, it seems that the agreement is, sometimes at least, sufficiently in writing to satisfy the Statute of Frauds, if the name of the party to be made liable is written in blank only, and the time and circumstances of the signing be such that the law implies a contract of guaranty; as where one not the payee of a note indorses it at a time subsequent to the making of it, for a valuable consideration.(*m*) Where an undertaking, although in form a guaranty, or promise to answer for the debt of another, is in substance an engagement to pay the guarantor's own debt in a particular way, or is a transaction distinct from the original liability, by which some new consideration moves between the newly contracting parties, such undertaking is not

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when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £45," it was held that parol evidence was admissible to prove that the note referred to was for £35, and that the withdrawal of the note was sufficient to satisfy the Statute of Frauds. Shortrede *v.* Cheek, 1 A. & E. 57. The following memorandum was held to show the consideration of the guaranty sufficiently upon its face: "I hereby guarantee the present account of Miss H. M., due to R. T. S. & Co., of £112 4*s.* 4*d.*, and what she may contract from this date to the 30th of September next." Russell *v.* Moseley, 3 Brod. & B. 211. And so in Bainbridge *v.* Wade, 16 Q. B. 89, per *Coleridge*, J. "There is no doubt as to the general rule which results from putting together Wain *v.* Warlters, 5 East, 10, and Stadt *v.* Lill, 9 East, 348. There must be an agreement, or a memorandum of one, to satisfy the Statute of Frauds; and the consideration is part of the agreement; it must, therefore, appear on the instrument, either in express terms or by implication, such as to leave no ambiguity. It is not to be supplied by extrinsic evidence; that is one rule. But there is another rule: that you may explain the meaning of the words used by any legal means. Of such legal means, one is to look at the situation of the parties. Till you have done that, it is a fallacy to say that the language is ambiguous: that which ends in certainty is not ambiguous." Lord *Campbell*, C. J. expressed himself in similar terms. In Bell *v.* Welch, 9 C. B. 154, the action was upon the following guaranty: "We, the undersigned, hereby indemnify the National Provincial Banking Co. to the extent of £1,000, advanced, or to be advanced, to R. P. by the said company." It appeared, however, that, at the time the guaranty was given, R. P. was indebted to the bank in a sum exceeding £1,000; and it was held that the guaranty did not, upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration. And see the late case of Broom *v.* Batchelor, 1 H. & N. 255.

(*m*) Ulen *v.* Kittredge, 7 Mass. 233; Tenney *v.* Prince, 4 Pick. 385; Moies *v.* Bird, 11 Mass. 436; Nelson *v.* Dubois, 13 Johns. 175; Turnbull *v.* Trout, 1 Hall, 336; Perkins *v.* Catlin, 11 Conn. 213, 229; Parks *v.* Brinkerhoff, 2 Hill, 663. *Contra*, see Hodgkins *v.* Bond, 1 N. H. 284. In Perkins *v.* Catlin, 11 Conn. 213, the court say the indorsement, being in writing, and in blank, is of itself an authority to write over it the agreement it was designed to express. Proof of the name is proof of the indorsement. There was a *memorandum* of the contract, signed by the party to be charged by it; or rather, the contract itself is so signed.

within the statute as a promise to pay the debt of another, but is regarded as an original promise; and therefore it is valid, al though it express no consideration, and need not even be in writing.(*n*) If the terms of the guaranty leave it doubtful whether the consideration was an executed consideration or not, parol evidence is admissible to explain the guaranty.(*o*)

SECTION II.

OF THE NEGOTIABILITY OF A GUARANTY.

It is a very important question, whether a guaranty of negotiable paper is itself negotiable. Strong opinions, resting on strong arguments, have been expressed in favor of the doctrine that the negotiability of the paper attaches to the contract of guaranty which is indorsed upon it,(*p*) and this sometimes has

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(*n*) Brown *v.* Curtiss, 2 Comst. 225. In this case the payee and holder of a promissory note transferred it to his creditor in exchange for his own note held by such creditor, and at the same time wrote on the back of the note, "I guaranty the payment of the within." The undertaking was held not to be within the statute. The principle is stated very clearly, and illustrated very ably, by Mr. Justice *Bronson*, in Johnson *v.* Gilbert, 4 Hill, 178. In Tomlinson *v.* Gill, Ambl. 330, Lord *Hardwicke* held that, if the consideration for the promise takes its root in a transaction distinct from the original liability, the case is out of the statute. The cases of Gold *v.* Phillips, 10 Johns. 412, Farley *v.* Cleveland, 4 Cowen, 432, and Olmstead *v.* Greenly, 18 Johns. 12, are to the same effect. So where the owner and holder of a promissory note sells the same, and as a condition of the sale guarantees its payment, his contract of guaranty is an original undertaking, and need not be in writing. Meech *v.* Smith, 7 Wend 315; How *v.* Kemball, 2 McLean, 103. See also Leonard *v.* Vredenburgh, 8 Johns. 29; Bailey *v.* Freeman, 11 id. 221; Watson *v.* Randall, 20 Wend. 201; Leland *v.* Creyon, 1 McCord, 100; Tyler *v.* Stevens, 11 Barb. 485; Johnson *v.* Gilbert, 4 Hill, 178; Union Bank *v.* Coster, 3 Comst. 203; Hunt *v.* Adams, 5 Mass. 358; White *v.* Howland, 9. id. 314; Simons *v.* Steele, 36 N. H. 73, 82; Anderson *v.* Davis, 9 Vt. 136; Elder *v.* Warfield, 7 Harris & J. 391.

(*o*) Weed *v.* Clark, 4 Sandf. 31. And see Draper *v.* Snow, 20 N. Y. 331.

(*p*) Walton *v.* Dodson, 3 Car. & P. 163; Watson *v.* McLaren, 19 Wend. 557, 26 id. 425; Ketchell *v.* Burns, 24 Wend. 456; Dean *v.* Hall, 17 Wend. 214; Leggett *v.* Raymond, 6 Hill, 639; Ellis *v.* Brown, 6 Barb. 282; Cooper *v.* Dedrick, 22 id. 516; Adams *v.* Jones, 12 Pet. 207; Small *v.* Sloan, 1 Bosw. 352; Heaton *v.* Halbert, 3 Scam. 489; Webster *v.* Cobb, 17 Ill. 459; Partridge *v.* Davis, 20 Vt. 499. In Cooper *v.* Dedrick, 22 Barb. 516, it was held, that when a guaranty is written upon a note payable to bearer, and the note is transferred, nothing being said touching the guaranty, the sale and delivery of the note with the guaranty upon it furnishes *prima facie* evidence of a sale of the contract of guaranty; and the possession of the note and the

been extended even so far as to embrace a guaranty written on a separate paper.(*q*) But the weight of authority is decidedly opposed to the negotiability of a guaranty in either case.(*r*)

Our view of this question is this: The negotiability of paper payable to order is established by a very peculiar exception to the general law of contracts; and this exception rests upon a usage so ancient and universal, as to show a distinct and urgent need of it. But the negotiability of a guaranty has no such usage in its favor, and is not, therefore, within the exception. Moreover, we do not think it likely to be brought within this usage, or on other grounds established by adjudication, because

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guaranty is *prima facie* evidence of a right in the holder to the guaranty. And in Small *v.* Sloan, 1 Bosw. 352, it was said that a guaranty, before the Code, was assignable so as to give an equitable title to the assignee, although he could not sue thereon in his own name; but, under the Code, it is not merely assignable, but the action thereon must be brought in the name of the assignee, as the real party in interest.

(*q*) The doctrine that a guaranty of negotiable paper ought to be held negotiable, even when it is upon a separate paper, was very ably supported by Mr. Senator *Verplanck*, in the case of McLaren *v.* Watson, 26 Wend. 425. There was a guaranty in general terms of the payment of a note written on a separate paper. The court, however, were of opinion that the guaranty, being upon a separate paper, was not negotiable. And see Bell's Commentaries on the Law of Scotland, Vol. I. B. 3, ch. 2, § 4, p. 371 – 374, 5th ed.

(*r*) True *v.* Fuller, 21 Pick. 140; Tyler *v.* Binney, 7 Mass. 479; Springer *v.* Hutchinson, 19 Maine, 359; M'Doal *v.* Yeomans, 8 Watts, 361; Ten Eyck *v.* Brown, 4 Chand. 151; Sandford *v.* Norton, 14 Vt. 228; Irish *v.* Cutter, 31 Maine, 536; Tuttle *v.* Bartholomew, 12 Met. 452; Belcher *v.* Smith, 7 Cush. 482; Miller *v.* Gaston, 2 Hill, 188; Tinker *v.* McCauley, 3 Gibbs, Mich. 188. In True *v.* Fuller, 21 Pick. 140, the action was upon a guaranty written underneath the signature of the payee, in these words, "I guaranty the payment of semiannual interest on this note, as well as the principal"; and the action was brought by one who subsequently became the holder of the note. The court held that he could not recover, because the guaranty in question was not made to him, or whilst he was holder of the note; that it was not negotiable in itself, and was not made so by being written upon, and intended to secure a negotiable instrument. In Osborn *v.* Hawley, 19 Ohio, 130, it was held that a power of attorney, not negotiable, attached to a note, becomes invalid and inoperative, when the note is transferred. In Lamourieux *v.* Hewit, 5 Wend., 307, it was held that a guaranty in general terms of the collection of a note did not authorize a suit thereon in the name of any subsequent holder of the note, but only in the name of the person with whom the contract was made. But now, under the code of New York, the suit may be brought in the name of the assignee, who is the party in interest. See *supra*, note *p*. And this rule against the negotiability of the guaranty applies also where the name of the person guaranteed is not mentioned; for then the party to whom the note is first transferred on the faith of the guaranty, acquires a right to recover on it in his own name; but he cannot transfer it so as to vest the right of action in any subsequent party. See cases, *supra*.

all exceptions are to be limited by the necessity for them; and we see no necessity for any such rule, inasmuch as all the good which could be gained from making guaranties negotiable may be derived, and is now in part derived, from the practice and the law of indorsement.

So a letter of credit, which is a species of guaranty, when addressed to no particular person, but generally to all, is deemed in some respects a negotiable credit, and is binding in favor of any one who makes advances upon the faith of it.(*s*) But if it be addressed to a particular person or firm, it will not render the guarantor responsible to other parties.(*t*)

As a guaranty is not negotiable, so neither is a guarantor regarded as an indorser, in respect to the effect of a discharge of him. A discharge of an indorser, as we have seen, is a discharge of any and every one to whom all subsequent parties, however numerous, might look. For if he be discharged, it follows that their security is impaired; and therefore a discharge of him is a discharge of them. It is not so with the discharge of a guarantor, for the very reason that no one but the guarantee can look to him. If, therefore, the guarantee chooses to discharge him, he impairs the security of no one else, and therefore no one else is discharged.

Such is the general rule; there may, however, be circumstances which would call for a qualification of it. If A makes a note to B, and B indorses to C upon C's assurance that A had given C security for the note, if C afterwards saw fit to return that security to A, he could not be permitted to call on B. But if C indorsed to D, D, being ignorant of these circumstances and taking the note in good faith, would not lose his claim on B because of C's act. And it would be so if the security from A to C had consisted in the guaranty of some third party to C, which C had discharged.

A guarantor is always as effectually discharged by a release of the principal debtor as he would be by payment of the debt.(*u*) So he is if time be given him without the consent of

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(*s*) Russell *v.* Wiggin, 2 Story, 213; Carnegie *v.* Morrison, 2 Met. 381, 395; Lawrason *v.* Mason, 3 Cranch, 492; Adams *v.* Jones, 12 Pet. 207; Lowry *v.* Adams, 22 Vt. 160; Birckhead *v.* Brown, 5 Hill, 634, 642.

(*t*) Bleeker *v.* Hyde, 3 McLean, 279.

(*u*) Cowper *v.* Smith, 4 M. & W. 519.

the guarantor,(*v*) and so he is by a surrender of collateral security given by the debtor.(*w*) But the taking of collateral security from him, without any agreement to give him time, does not discharge the guarantor.(*x*)

The taking a new note from the principal debtor, payable at a future day, because it suspends the right of collecting the original note,(*y*) is in all cases an unwarranted extension of credit, and discharges the guarantor.(*z*)

As a guaranty is itself not negotiable, the question has arisen whether a guaranty written on the back of negotiable paper, and signed by a payee, had the effect of destroying the further negotiability of the paper. The cases are few on this subject, and in conflict.(*a*) On principle, we should answer decidedly in the

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(*v*) Holl *v.* Hadley, 5 Bing. 54; Howell *v.* Jones, 1 Cromp. M. & R. 97; Bangs *v.* Mosher, 23 Barb. 478; Shook *v.* State, 9 Port. Ala. 113; Chute *v.* Pattee, 37 Maine, 102; Crosby *v.* Wyatt, 10 N. H. 318.

(*w*) Mayhew *v.* Crickett, 2 Swanst. 185, 191.

(*x*) Sigourney *v.* Wetherell, 6 Met. 553, 564; Norton *v.* Eastman, 4 Greenl. 521.

(*y*) See *post*, chapter on Payment by Bill or Note.

(*z*) Hart *v.* Hudson, 6 Duer, 294, 304. The cases upon this point are cited in the opinion of *Duer*, J.

(*a*) In Massachusetts it is held that signing of a guaranty upon the back of a note is not such an indorsement as will authorize the holder of the note to sue upon it as indorsee. Tuttle *v.* Bartholomew, 12 Met. 452. This was an action upon the following note: "For value received, I promise Peter Snyder to pay him or order five hundred dollars on demand. Wyllis Bartholomew." Upon the back of this note was indorsed the following: "We guaranty the payment of this note. April 5, 1844. (Signed,) Peter Snyder, Samuel Blodget." See Tyler *v.* Binney, 7 Mass. 479; Blakely *v.* Grant, 6 Mass. 386. This case was decided a year previous to that of Tyler *v.* Binney, but does not appear to have been referred to in the argument or decision of the latter case. In the case of Blakely *v.* Grant, it was held that a signature of the payee to the following words, "Should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in addition to the principal, twenty per cent damages," might operate as a transfer of the bill of exchange, and that the indorsement was good, though no person was named as indorsee; and that a *bona fide* holder might insert above such stipulation a direction to pay the contents to his order." In Upham *v.* Prince, 12 Mass. 14, the payee, having signed a guaranty of the note, expressed to be such, was held liable to the holder of the note as upon a common indorsement. The principle of this decision seems necessarily to be, that the note was duly transferred by the signature of the payee to the guaranty. . . . . The present case presents all the objections that were stated in the case of Tyler *v.* Binney, 7 Mass. 479, which we are inclined to adopt as the better opinion, and which were there held fatal to the maintenance of the action; with this additional one, which we think of great weight, viz. that the guaranty in the present case is a joint guaranty of Peter Snyder, the payee, and Samuel Blodget. This is a joint, and not a joint and several guaranty. How can it be transformed into a general in-

negative. Neither does the negotiability of the paper make the guaranty negotiable, nor the non-negotiability of the guaranty make the paper non-negotiable; but the holder with such indorsement may himself indorse the paper again, and so may his indorsee.

Another question may arise, which is, whether that subsequent holder can treat such indorser as any other than guarantor; that is, can hold him on the guaranty without proving consideration. On this point we are of opinion, that, as the holder sees fit to accept this limited indorsement, he is bound by it. And as it is notice to everybody, every subsequent indorsee is equally bound, and as much so as he would be by the words "without recourse";

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dorsement by Snyder? The contract or instrument signed by Snyder and Blodget is not only filled up and complete in itself, but it is obviously intended as a stipulation to which the names of both these persons may properly be subscribed. But a general indorsement of this note could only be made, in the first instance, by Snyder, the promisee. In this Blodget could not join. We are satisfied that no other effect can be given to this writing than that of a joint guaranty, and that this note was not transferred thereby, as by a general indorsement in blank, by the promisee. This objection is therefore fatal to the action." Per *Dewey*, J., in Tuttle *v.* Bartholomew, 12 Met. 452. In Belcher *v.* Smith, 7 Cush. 482, it was held that the payee of a note, who signed his name to these words written on the back thereof, "I hereby guaranty the within note," is not liable thereon as indorser. *Dewey*, J. also delivered the opinion in this case, and referring to the above decision, said that, irrespective of the objection that the guaranty was signed not only by the payee, but also by another person, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name as indorsee. In Van Derveer *v.* Wright, 6 Barb. 547, it was held that a transfer of a note payable to order made by a guaranty, indorsed by the payee, was not sufficient to enable a subsequent holder to sue the guarantor in his own name. See also Crenshaw *v.* Jackson, 6 Ga. 509; Hance *v.* Miller, 21 Ill. 636; Canfield *v.* Vaughan, 8 Mart. La. 682, 697. On the other hand, in Myrick *v.* Hasey, 27 Maine, 9, it was held, that an indorsement by the payee in these words, "I hereby guarantee the payment of the within note. R. D. H.," was sufficient to the holder to recover against the maker in a suit upon the note, although the court said the guaranty itself was not negotiable. The case of Partridge *v.* Davis, 20 Vt. 499, goes still further. The payee had indorsed as in the preceding case, and the plaintiff, who was not his assignee, but a subsequent holder, declared against him in one count as indorser, and in another as guarantor; and the court were of opinion that he had a good cause of action in either count. *Davis*, J., delivering the opinion of the court, said that this guaranty was the same thing in legal effect, and for every practical purpose, as an indorsement, and might be treated as such; and it operated to transfer the legal title in the note to any subsequent holder, notwithstanding the person to whom the note was first transferred was not named in the indorsement, and this is not made, in terms, to order or bearer. He was also of opinion that the defendant was liable as a guarantor; and that any subsequent holder might recover against him upon his guaranty, as well as against the maker upon the note.

and accordingly neither the guarantee nor any subsequent indorsee can hold the indorser without showing that he made this guaranty on sufficient consideration.

But, on the other hand, he may, having shown a consideration, hold the guarantor, without proof of presentment or demand or notice, unless the guarantor can show negligence in the holder, and actual loss sustained by the guarantor from the want of such presentment, demand, or notice.(*b*) Such we take to be

(*b*) Warrington *v.* Furbor, 8 East, 242, 245; Philips *v.* Astling, 2 Taunt. 206, 211; Hitchcock *v.* Humfrey, 5 Man. & G. 559, 568; Walton *v.* Mascall, 13 M. & W. 72; Van Wart *v.* Woolley, 3 B. & C. 439; Wright *v.* Simpson, 6 Ves. 714; Gillighan *v.* Boardman, 29 Maine, 79; Rhett *v.* Poe, 2 How. 484; Beckwith *v.* Angell, 6 Conn. 315; Gibbs *v.* Cannon, 9 S. & R. 189, 202; Lewis *v.* Brewster, 2 McLean, 21; Foote *v.* Brown, 2 McLean, 369; Hank *v.* Crittenden, 2 McLean, 557; Skofield *v.* Haley, 22 Maine, 164; Howe *v.* Nickels, 22 Maine, 175; Thrasher *v.* Ely, 2 Smedes & M. 139; Hall *v.* Rodgers, 7 Humph. 536; Lewis *v.* Harvey, 18 Misso. 74; Grice *v.* Ricks, 3 Dev. 65; Wildes *v.* Savage, 1 Story, 26; Rich *v.* Hathaway, 18 Ill. 548; Jones *v.* Pierce, 35 N. H. 295; Clark *v.* Merriam, 25 Conn. 576; Farmers & Mechanics' Bank *v.* Kercheval, 2 Mich. 504; Green *v.* Dodge, 2 Ohio, 430; Heaton *v.* Hulbert, 3 Scam. 489; Murray *v.* King, 5 B. & Ald. 165; Johnson *v.* Wilmarth, 13 Met. 416; Simons *v.* Steele, 36 N. H. 73. The question, whether a guarantor is liable at all events, or only upon condition, was first decided in Massachusetts in the case of the Oxford Bank *v.* Haynes, 8 Pick. 423, where a guaranty was held to be a conditional engagement, from which the guarantor will be discharged by the neglect of the holder of a note guaranteed to demand payment of the maker, and to give the guarantee notice of non-payment, provided the maker was solvent when the note fell due, and afterwards became insolvent. The distinction is taken, that the guarantor is discharged only by the joint effect of negligence on the part of the holder, and actual loss or prejudice to the guarantor in consequence of that negligence. The guarantor was held discharged where no demand was made on the promisor to pay the note guaranteed, which was secured to the plaintiff by mortgage, and the promisor remained solvent for six months after the last instalment became due, and was permitted to receive the profits of the mortgaged property for three years after that time, and the defendant received no notice of the non-payment till two years afterwards. Talbot *v.* Gay, 18 Pick. 534. "The same strictness of proof, as to the demand and notice," said *Wilde*, J., in this case, "is not necessary to charge a guarantee, as is required to charge an indorser; but the demand on the maker, if he be solvent at the time the note falls due, must be made in a reasonable time; and if the holder shall unreasonably delay so long as to cause an injury to the guarantee, he will be discharged." In the case of Bickford *v.* Gibbs, 8 Cush. 154, the action was upon a guaranty containing an express waiver of demand and notice. *Shaw*, C. J. reviewed some of the leading cases on the general liability of guarantors, and deduced from them the principle, "That, in order to maintain an action against a guarantor, a demand of payment must be made in a reasonable time of the principal, and notice of non-payment given to the guarantor; and if in consequence of want of such notice the guarantor suffers loss, he is exonerated." But in the case before the court, the guarantor had expressly agreed to waive demand and notice, and *conventio legem vincit*. "The effect of that waiver is," continued the eminent judge, "to put the plaintiff in the same situation as if he had proved that he seasonably demanded the

the decided weight of authority, although the citations in our notes will show that the authorities are not in harmony on this point.

So, too, we should hold, although here also there is some conflict, that if a guarantor calls on the creditor or holder to proceed against the principal, and the principal delays or refuses to do so, this does not discharge the guarantor, because he has the power of paying the debt himself, and then acquiring the creditor's power of proceeding against the principal debtor. Still it is true that a guarantor is entitled to reasonable care and diligence on the part of the guarantee to collect the debt of the principal, and save the guarantor harmless.(*c*) The guarantor will be dis-

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money of the promisor, who did not pay it, and gave reasonable notice thereof to the defendants." In Worcester Co. Inst. for Savings *v.* Davis, 13 Gray, 531, it was decided that such a guaranty, expressly "waiving all right to demand and notice," cannot be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal debtor, and of laches in pursuing him. In New York, a guaranty of payment is considered an absolute, and not a conditional, undertaking. Allen *v.* Rightmere, 20 Johns. 365. This was an action upon a special guaranty indorsed on a note in these words: "For value received, I sell, assign, and guaranty the payment of the within note, to John Allen, or bearer." By the court, *Spencer*, C. J.: "It is the duty of the debtor to seek the creditor, and pay his debt on the very day it becomes due. As regards the maker of the note, and to render him liable, no demand is necessary. A demand of payment is necessary only to fix an indorser, or a surety, whose undertaking is conditional. An indorser does not absolutely engage to pay. It is a conditional undertaking to pay, if the maker of the note does not, upon being required to do so, when the note falls due, and upon the further condition that the indorser shall be notified of such default. The defendant insists that he stands in the situation of an indorser merely; but such is not the fact. The undertaking here is not conditional; it is absolute that the maker shall pay the note when due, or that the defendant will himself pay it." This is declared to be the settled law of the State, in Brown *v.* Curtiss, 2 Comst. 225, 228. And so held in Wisconsin, Mallory *v.* Grant, 4 Chand. 143; Ten Eyck *v.* Brown, id. 151. And in Alabama, Donley *v.* Camp, 22 Ala. 659; Townsend *v.* Cowles, 31 id. 428.

(*c*) Talbot *v.* Gay, 18 Pick. 534; Gamage *v.* Hutchins, 23 Maine, 565; Miller *v.* Berkey, 27 Penn. State, 317; Moakley *v.* Riggs, 19 Johns. 69; Kies *v.* Tifft, 1 Cowen, 98; Lamoureux *v.* Hewit, 5 Wend. 307. In Isett *v.* Hoge, 2 Watts, 128, payment of the note guaranteed was not demanded in the lifetime of the maker, who lived nearly eight years after the note fell due; and this was held to be such gross negligence as to discharge the guarantor. So, also, where a note payable on demand was guaranteed, and it appeared that the maker continued solvent two years, during which time no attempt was made to collect it, the guarantor was held discharged. Gamage *v.* Hutchins, *supra*; and so the notice of demand and non-payment was not given to the guarantor till fourteen months afterwards, when the maker was insolvent. Whiton *v.* Mears, 11 Met. 563. Where the holder of a guaranteed note had been guilty of such laches as deprived him of any legal claims on the guaranty, and the guarantor,

charged if he can show *actual* loss or an actual presumption of loss from the want of such care and diligence; but there is not in his case a *legal* and *absolute* presumption of negligence and injury, as there is in the case of an indorser.

Where the principal debtor is wholly insolvent when the debt becomes due, and so continues, there seems to be a presumption against any injury having occurred to the guarantor from the holder's want of diligence in seeking satisfaction for the original debt.(*d*)

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afterwards, on the demand of the holder, paid him the interest on the notes, knowing and protesting that he was not liable on his guaranty, it was held that he waived the holder's laches, and continued to be liable to him on the guaranty, and that the effect of such payment was not avoided by the holder's threat to sue the guarantor for other large debts which he owed the holder, unless he would pay such interest. Sigourney *v.* Wetherell, 6 Met. 553. And so held also in Ashford *v.* Robinson, 8 Ired. 114. But it was held in Van Derveer *v.* Wright, 6 Barb. 547, that, after the guarantor of a note has been discharged by the laches of the holder, there is no moral obligation to pay it, and he cannot be again made liable, even upon an express promise. *Willard*, J. thought otherwise, and also that to support a waiver it was not necessary for the plaintiff to prove affirmatively that it was made with full knowledge of the laches, but that this might be inferred from the promise, under the attending circumstances. In Tinkum *v.* Duncan, 1 Grant's Cas. 228, it was held that a promise by a guarantor, after the failure of his principal to pay the debt, is an admission that there has been no such want of diligence as is prejudicial to his interest. The law in Connecticut in regard to the diligence required to charge the guarantor is peculiar. In Clark *v.* Merriam, 25 Conn. 576, 582, it was said that the diligence required by law is the immediate institution of a suit by attachment, if the maker of the note guaranteed is possessed of property; and in case of a note payable on demand, what is unreasonable delay in bringing suit must depend on circumstances indicating the intention of the parties. In Castle *v.* Candee, 16 Conn 223, *Waite*, J. thought the rule ought to be in such case that, until a request to bring suit was made by the guarantor, the delay was not unreasonable; but the court declined to lay down any absolute rule. See also Ranson *v.* Sherwood, 26 Conn. 437, where it was further held, that, in a suit brought by the holder of a note against one who had guaranteed it by a blank indorsement, the mere fact that the maker of the note provided no funds to pay it at the time and place of payment, but suffered it to be protested for non-payment, does not furnish *prima facie* proof that the maker was insolvent when the note fell due; and the mere fact that the holder presented it for payment, at the place of payment when it fell due, and caused it to be protested for non-payment, and caused notice thereof to be given to the indorser, does not furnish *prima facie* proof that the holder used due diligence to collect the note when due.

(*d*) Warrington *v.* Furbor, 8 East, 242; Holbrow *v.* Wilkins, 1 B. & C. 10; Philips *v.* Astling, 2 Taunt. 206; Van Wart *v.* Woolley, 3 B. & C. 439; Reynolds *v.* Douglass, 12 Pet. 497; Rhett *v.* Poe, 2 How. 457; Wildes *v.* Savage, 1 Story, 22; Lent *v.* Padelford 10 Mass. 230; Bashford *v.* Shaw, 4 Ohio State, 263, 268; Walker *v.* Forbes, 31 Ala. 8; Lamoureux *v.* Hewit, 5 Wend. 307; Thomas *v.* Woods, 4 Cowen, 173; Van Derveer *v.* Wright, 6 Barb. 547, 552; Hance *v.* Miller, 21 Ill. 636; Gibbs

Notice of the acceptance of a guaranty is requisite to complete the obligation of it when it is prospective or contingent.(*e*) And where the guarantor's liability is made to depend upon the choice or option of the other party, or upon any act or event peculiarly within his knowledge, notice of the matter that fixes the liability of the guarantor must be given him.(*f*)

If the undertaking of the guarantor be to pay on request or on demand, the request or demand is an essential part of the contract, and must be specially alleged and proved.(*g*)

One who has guaranteed the payment of a bill or note is liable for interest from the time of the default of the maker or acceptor, at least if he has received notice of such default.(*h*)

A guarantor is not liable for contribution to a maker, or any other party on a note or bill, or to any person except one who is a joint guarantor with himself.(*i*)

A distinction is made between a guaranty of the payment of a

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v. Cannon, 9 S. & R. 198. And see 2 Am. Lead. Cas. 33 – 138, under the cases Lent *v.* Padelford and Douglass *v.* Reynolds.

(*e*) Lee *v.* Dick, 10 Pet. 482. The suit in this case was brought upon a guaranty, contained in a letter addressed to the plaintiffs, and worded as follows: "Gentlemen, Nightingale & Dexter, of Maury Co., Tennessee, wish to draw on you at six and eight months; you will please accept their draft for $ 2,000, and I do hereby guarantee the punctual repayment of it." A letter addressed to P. B. Dexter, one of the firm of Nightingale & Dexter, and written on the same paper with the guaranty, showed that the guarantor intended to make himself answerable to the extent of $ 2,000, for the payment of a bill for a larger sum, which they proposed to draw, and which was drawn accordingly. It was held, that, although a guaranty of an existing debt might be good without notice, the case was different where the engagement was for the repayment of future advances which might be given or withheld, at the option of the other party to the contract, who was said to be bound to give information of his intention to accept and act under the guaranty, if not immediately, at least within a reasonable time after he received it. See Wildes *v.* Savage, 1 Story, 22; Bradley *v.* Cary, 8 Greenl. 234; Douglass *v.* Howland, 24 Wend. 35; Union Bank *v.* Coster, 3 Comst. 212.

(*f*) See 2 Am. Lead. Cas. 33, *et seq.* In Lewis *v.* Bradley, 2 Ired. 303, upon an agreement to make good all sums which could not be collected on certain notes assigned in payment of a debt, as soon as they should be returned by any constable chosen by the assignee as incapable of collection, it was held that there could be no recovery without an averment and proof that notice of the failure of the officer in whose hands they were placed to obtain payment upon them had been given to the defendant. So in a similar case in Vermont, Sylvester *v.* Downer, 18 Vt. 32.

(*g*) Nelson *v.* Bostwick, 5 Hill, 37; Douglass *v.* Rathbone, id. 143.

(*h*) Washington Bank *v.* Shurtleff, 4 Met. 30; Ackermann *v.* Ehrensperger, 16 M. & W. 99.

(*i*) Longley *v.* Griggs, 10 Pick. 121.

bill or note, and a guaranty of its collection; the guarantor in the latter case being liable only after a regular prosecution against the principal party liable upon the paper, and the use of due and reasonable diligence on the part of the plaintiff to collect the same by due course of law.(*j*) And for this purpose a warranty that "the note is good" has been held as only a warranty that it is collectible.(*k*)

Notice that the bill or note cannot be collected should also be

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(*j*) Moakley *v.* Riggs, 19 Johns. 69. In this case the guarantor, in consideration of a sale of goods to the maker of the note, "undertook and faithfully promised that the note was good and collectible after due course of law"; and it was held that the use of diligence in attempting to collect the note by due course of law was a condition precedent, to be performed by the plaintiff; and that a neglect for the space of seventeen months to proceed against the maker of the note operated as a discharge of the guarantor. So where a party "guaranteed the collection of the note." Cumpston *v.* McNair, 1 Wend. 457. And where such a guaranty was written on the back of a note already indorsed, it was decided in an action on the guaranty that the plaintiff must show a diligent attempt to collect the note, both as against the indorser and maker, before he could recover. Loveland *v.* Shepard, 2 Hill, 139; Moakley *v.* Riggs, 19 Johns. 69; Day *v.* Elmore, 4 Wisc. 190; Hart *v.* Hudson, 6 Duer, 294, 303; and cases in next note.

(*k*) Curtis *v.* Smallman, 14 Wend. 231; Cooke *v.* Nathan, 16 Barb. 342. But see *contra*, Koch *v.* Melhorn, 25 Penn. State, 89; Hammond *v.* Chamberlin, 26 Vt. 406. But a guaranty that "all drafts drawn by G. C. H. will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself," is a guaranty of payment, and it is not necessary first to exhaust all legal remedy upon the bills against G. C. H., before the guarantor is rendered liable. Grant *v.* Hotchkiss, 26 Barb. 63. For further cases distinguishing between guaranties of payment and those of collection, see Spicer *v.* Norton, 13 Barb. 542; Dwight *v.* Williams, 4 McLean, 581; Parker *v.* McKelvain, 17 Texas, 157; Ely *v.* Bibb, 4 J. J. Marsh. 71. See Day *v.* Elmore, 4 Wisc. 190, 194, where *Smith*, J., delivering the opinion of the court, said that the law does not fix any definite time within which suit must be commenced. This must depend upon all the circumstances of the case, and hence what is due diligence is a mixed question of law and fact. Where there was a guaranty of the collection of a note, and it was shown that the maker of it removed from the State before the note became due, it was held that a recovery might be had on the guaranty, as the contract was thought to imply that the maker would be in a situation to be sued within the jurisdiction of the State. White *v.* Case, 13 Wend. 543; Cooke *v.* Nathan, 16 Barb. 342. And see Camden *v.* Doremus, 3 How. 515. But this is otherwise if the maker resides in a foreign State or country, at the time the guaranty is entered into. Burt *v.* Horner, 5 Barb. 501. The holder must prosecute him there before he can have recourse to the guarantor. Id. As the due course of law against the debtor is a condition precedent to give the remedy against the guarantor, a suit is as essential where the debtor is insolvent as where he is not so. Per *McLean*, J., in Dwight *v.* Williams, 4 McLean, 581. But see *contra*, cases cited *infra*, p. 142, note *o*. If the suit fails on account of defective service of the writ, the guarantor is discharged. Beach *v.* Bates, 12 Vt. 68; Wheeler *v.* Lewis, 11 id. 265.

given to the guarantor within a reasonable time; and if this is delayed, evidence may be received that the guarantor was prejudiced thereby, although the officer had returned the execution unsatisfied for want of property on which to levy.(*l*)

Where the note guaranteed is secured by a mortgage, the holder is not required to proceed under this and obtain a foreclosure, after having prosecuted the note to judgment and execution, nor to pursue any collateral rights or remedies; but the guarantor is entitled to the use and control of these after his liability has become fixed.(*m*) And because a guarantor is entitled to all the security and all the protection which he had a right to expect from the circumstances existing when he made the guaranty, it is held that if the note be at that time duly indorsed, the guaranty is discharged by any laches as to demand and notice which discharges the indorser.(*n*)

In case the principal debtor is insolvent at the time the bill or note becomes due, the collection of which is guaranteed, and continued to be so, the holder is not obliged to institute legal proceedings against him, and to prosecute the same to judgment and execution, before resorting to the guarantor.(*o*) The obtaining of a judgment, and an execution returned unsatisfied for

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(*l*) Wolfe *v.* Brown, 5 Ohio State, 304. In this case the plaintiff had omitted to give the guarantor notice that he had not collected the note guaranteed for three years after the officer had made a return of "No goods" on the execution. The court said, that if such notice had been given within a reasonable time, the return of the officer might have been conclusive evidence that due diligence had been used to collect the note; but as it was, the guarantor was entitled to show that he had been injured by the delay. And see Bashford *v.* Shaw, 4 Ohio State, 263, 267; Day *v.* Elmore, 4 Wisc. 190, 198; Gillighan *v.* Boardman, 29 Maine, 79.

(*m*) Day *v.* Elmore, 4 Wis. 190, 197.

(*n*) Loveland *v.* Shepard, 2 Hill, 139; Dana *v.* Conant, 30 Vt. 246.

(*o*) Sanford *v.* Allen, 1 Cush. 473; Perkins *v.* Catlin, 11 Conn. 213, per *Huntington*, J.; Ranson *v.* Sherwood, 26 Conn. 437; Wheeler *v.* Lewis, 11 Vt. 265; Bull *v.* Bliss, 30 id. 127; Dana *v.* Conant, 30 id. 246; Camden *v.* Doremus, 3 How. 515, 533. In the latter case, Mr. Justice *Daniel* said: "The diligent and honest prosecution of a suit to judgment, with a return *nulla bona*, has always been regarded as one of the extreme tests of due diligence. This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit." And so in M'Doal *v.* Yeomans, 8 Watts, 361, on a guaranty that a note was collectible, it was held that the insolvency of the maker excused the want of an attempt to collect the debt from him by process.

want of property, though perhaps the most satisfactory evidence that the debt is not capable of being collected, is not the only evidence of that fact, nor would it be so absolute and conclusive as to be incapable of contradiction or explanation.

A guarantor is entitled to all equities and advantages which the guarantee has received.(*p*) Thus, if one guarantees a seller of goods, and delivers him for that purpose a note on which the guarantor is liable, and the seller receives part payment, he is entitled to so much only of the note as will satisfy the balance, and must return the note if the guarantor tenders him this balance; and if he retains and collects the note, he will be held as the trustee of the guarantor for all of the proceeds over and above what is sufficient to pay the balance remaining due on the original purchase.(*q*)

In an action upon a guaranty indorsed upon a note, the signature of the maker is sufficiently proved by proving the execution of the guaranty,(*r*) and it is no defence that this signature is not genuine; and even when the guaranty is written upon a separate paper, in which the note is identified with certainty, and it is proved that the guarantor was shown the note before he made the guaranty, it seems that the same rule would apply, if there was no fraud or misrepresentation, and it would be no defence that the signatures upon the note at the time the guaranty was made, or some one of them, were in fact forged.(*s*)

(*p*) Washington Bank *v.* Shurtleff, 4 Met. 30; Crocker *v.* Gilbert, 9 Cush. 131; Hidden *v.* Bishop, 5 R. I. 29.

(*q*) See Washington Bank *v.* Shurtleff, 4 Met. 30.

(*r*) Cooper *v.* Dedrick, 22 Barb. 516.

(*s*) Veazie *v.* Willis, 6 Gray, 90. This action was upon the following guaranty: "Boston, April 25th, 1850. For and in consideration of eighty dollars received of Joseph A. Veazie, I hereby guaranty the payment of a note signed by Edmund Boynton, and payable to George Lambert, and by him indorsed; also indorsed by B F. Wellington and Charles M. Reed. The amount of said note is one thousand ninety-eight dollars $\frac{41}{100}$. Note dated December 26th, 1849, and payable in six months. Clement Willis." It was proved that the signature of Boynton and the indorsement of Lambert were forgeries; that the indorsement of Wellington and Reed were genuine; and that the fact of the forgery was only known to Wellington, neither Reed, Veazie, nor Willis having any reason to suspect that fact. Held, that the guarantor was bound to pay the note, if there was no other note in circulation answering to the description in the guaranty.

SECTION III.

OF OTHER COLLATERAL AGREEMENTS.

As to other agreements respecting notes and bills, it has been already said, that any private agreement affecting a negotiable note may be binding as between the parties to it, unless it be oral only, and the evidence of it is excluded by the rule which refuses oral evidence, or evidence of an oral contract, when it would vary or contradict a written contract. And if the note be not negotiable, all who take it by assignment take only the rights of their transferrer, subject to the defences which might be made at the time of the transfer against him. If the paper be negotiable, no parties are affected by these bargains but those who take the paper with knowledge of them.

A written agreement to renew the note, or to qualify its obligations in any way, is good as between the parties to it. But an agreement to renew, whether on the note or on another instrument, is, however, construed as an agreement to renew once only; as otherwise it would be perpetual, and amount to a promise never to pay.(*t*) If, however, the agreement expressly provide for a certain reasonable number of renewals, we know no reason why it should not be valid.

From a recent case it might be inferred that, if the bargain be between a party to the paper and the other parties, together with other persons, this joinder of others would prevent the bargain from being parcel of the note, or directly connected with it; and as it would be collateral, it must rest upon its own consideration; and if the effect of the bargain were that the note should not be sued until a certain event or period, this bargain would have no effect as a defence to a suit on the note, unless under the general rule that a covenant not to sue at all may be a bar to a suit on the promise, but not a covenant not to sue for a time certain.(*u*)

It may be said that all agreements intended to affect in some way the terms of a bill or note must be written, on the common

(*t*) Innes *v.* Munro, 1 Exch. 473.
(*u*) Webb *v.* Spicer, 13 Q. B. 894.

principle of evidence, which will not permit a written contract to be controlled by parol evidence; but they may be written on the same paper with the bill or note, or on a different paper. If they are written on a different paper, there is some disposition to give to them the same effect as if written on the same paper, provided they were written simultaneously with the note. But this rule cannot be general. It may apply to a considerable extent to the parties to it, and in some cases to distant parties, who take the bill or note with notice or knowledge; but not always to them.

If two parties agree upon a common negotiable note, and also upon certain terms in relation to it, which they write on a separate paper, it would seem that a purchaser of the note might consider these terms as purposely separated from the paper, that they might not go with it, and therefore as affecting only the original parties. It is obvious, however, that the agreement may be such as to make it a fraud on the part of the payee to indorse it over so as to liberate the paper from the agreement. And if so, no party cognizant of the fraud could found any right upon it.

The question has been somewhat discussed whether such an agreement, if we suppose it to be one which affects and binds the holder, whether he be an original or remote payee, affects him as a part of the note, or only as a defence which the defendant may avail of. We think (always supposing the papers to be separate) the latter must be generally the case; and therefore the plaintiff need not notice such agreement in his declaration.(*v*)

Where, however, a note is made payable upon some condition contained in the note itself, unless the condition be merely a defeasance of the contract, it forms a constituent part of the contract, and cannot be omitted in the declaration as a matter of defence.(*w*)

(*v*) Smalley *v.* Bristol, 1 Mich. 153. See Bowerbank *v.* Monteiro, 4 Taunt. 844.

(*w*) Woodstock Bank *v.* Downer, 27 Vt. 482. This was an action on a note payable in ninety days from date, with a provision that if, at the end of ninety days, the makers pay one half the note and the interest on the other half in advance for ninety days, the payment of that half shall be extended for that further length of time. The declaration described the note as payable in ninety days from date; and it was held that there was a variance. In Barnard *v.* Cushing, 4 Met. 230, where the payee of a note, at the time it was signed by the maker, and as a part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount

If the collateral agreement be on the same paper, it may be written in the body of the note, or on the margin, or at the bottom, or on the back; and it is generally held to have the same effect as if it had been written in the body of the note,(*x*) though in some courts, when thus written, it is not regarded as a part of the note.(*y*) If written in the body of the note, then it either arrests the circulation of the note, or, if it does not, it goes with the note, and affects all parties to it, whether original or remote. The principal question then is, whether the agreement leaves the note still negotiable or prevents this. For only a promissory note having certain essential characteristics is, as we have seen, negotiable. We apprehend the answer to this question to be this: If the collateral agreement be one which destroys or impairs any of these essential characteristics of negotiable paper, it prevents the paper from being negotiable.(*z*)

Thus, if it makes the parties uncertain, or renders the obligation contingent or indefinite, either as to amount or time, or by reference to any exigency or condition, or if it provides an alter-

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when convenient for the maker to pay it, it was held that the indorsement must be taken as part of the instrument, and that the payee could not maintain an action thereon, leaving the defendants to their cross-action for any violation of the collateral agreement. In Heywood *v.* Perrin, 10 Pick. 228, where, at the bottom of the note, payable on demand, was written a memorandum, of the following purport: "One half to be paid in twelve months, and the balance in twenty-four months"; and it was held that this was a constituent part of the promise, and could not be regarded as a collateral and independent contract. For further cases upon this point in the same State, see Jones *v.* Fales, 4 Mass. 245; Springfield Bank *v.* Merrick, 14 id. 322; Makepeace *v.* Harvard College, 10 Pick. 298; Wheelock *v.* Freeman, 13 Pick 165.

(*x*) Barnard *v.* Cushing, 4 Met. 230; Shaw *v.* Methodist Epis. So., 8 Met. 223.

(*y*) Sanders *v.* Bacon, 8 Johns. 485; Tappan *v.* Ely, 15 Wend. 362; Pool *v.* McCrary, 1 Ga. 319.

(*z*) In Davies *v.* Wilkinson, 10 A. & E. 98, the instrument contained a promise to pay to Charles Davies or order £ 695, in four instalments; one of £ 200, two of £ 150 each, and one of £ 100 at times specified, and the remaining £ 95 was to go as a set-off against certain matters specified. The court held it not a promissory note. Lord *Denman*, C. J. said: "It is a note, up to a certain point, but it ends, '£ 95 to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him.' I think that takes from it the character of a promissory note, and makes it an agreement." *Littledale*, J.: "To be a promissory note, the writing should be one entire instrument. Here the instrument, as to £ 95, is not a promissory note, but an agreement; therefore the entire instrument is not a promissory note." But where a note was in this form, — "I promise to pay, &c. £ 100, as per memorandum of agreement," — it was held that the words "as per memorandum of agreement" did not qualify the promise in the note. Jury *v.* Barker, 1 Ellis. B. & E. 459.

native which the promisee may avail of to his own advantage, we should say the paper was no longer negotiable. But if it leaves the payment, as to all circumstances of time, amount, and person, as certain, or at least as obligatory as before, and only provides or declares that certain security attaches to the note, or that certain rights go with it, or that the amount, when paid, is to be appropriated in a certain way, then it leaves the paper still negotiable.(*a*)

Our notes will show that the cases on this subject are hardly reconcilable; but we think the principle above stated would suffice to determine most of them. Thus, it is not uncommon for notes to contain or state the fact, that the promisor appoints the payee, or order, or the holder, his attorney, to confess judgment for him when the note is payable. And we prefer the decisions which consider the note as still negotiable to those which regard it as now only a general agreement not transferable by indorsement.(*b*)

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a) Wise *v.* Charlton, 4 A. & E. 786. The note in this case recited that the maker had deposited certain title-deeds with the payee as a collateral security; and it was held that this was no qualification of the absolute character of the note. When a railroad company executed a note, with the provision that "this note," up to a time six months before the money was payable, might (at the diction of the holder) be surrendered, and the holder on such surrender should be entitled to receive its amount in stock of the company instead of money, it was held that the essential quality, that the money must be payable absolutely and unconditionally, was not impaired, and that the note was still negotiable. Hodges *v.* Shuler, 24 Barb. 68. In Treat *v.* Cooper, 22 Maine, 203, it was held that the words, "the contents of this note to be appropriated to the payment of R. M. N. S.'s mortgage to the payee," were not in restraint of the negotiability of the note. And so a note payable to order, and without contingency, on a day certain, is not the less negotiable because it purports to be according to the condition of a mortgage, the terms of the note and mortgage corresponding. Littlefield *v.* Hodge, 6 Mich. 326. Where a negotiable note also states that the maker has deposited bonds as collateral security for its payment, and that he agrees, on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such a sale, the instrument does not thereby lose its negotiable character; for the collateral contract relates solely to the money promised to be paid, is in addition to the principal contract, and does not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it a sum certain, and on the day specified. Arnold *v.* Rock River Valley Union Railroad Co., 5 Duer, 207. A note, made as follows, — "On demand, I promise to pay," &c., "and I have lodged with said H. the counterpart leases signed by D," &c. "for ground let by me to them respectively, as a collateral security for the said £ 500, and interest, £ 500," — was held a promissory note. Fancourt *v.* Thorne, 9 Q. B. 312.

(*b*) In Osborn *v.* Hawley, 19 Ohio, 130, it was held that a power of attorney to con-

If, as is said, the intention of the parties must govern in the construction of the note, how can it be inferred from such a provision that the note was intended to be not negotiable, if the provision itself contained such words as order, holder, bearer, &c., which can have no meaning unless it is negotiable. If they

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fess judgment, attached to the note, and forming a part of the same instrument, does not destroy the negotiability of the note. The court said that the power does not in any way change the legal character of the note, except that it gives a more summary proceeding for its collection. Overton *v.* Tyler, 3 Penn. State, 346, is a leading case against the negotiability of an instrument in the form of a note payable to order or to bearer, and having in addition an authority to confess judgment for the amount. The instrument upon which this case arose was as follows: "$ 1,000. Athens, February 15, 1845. For value received, I promise to pay Francis Tyler and Levi Westbrook, or bearer, one thousand dollars, with interest, by the first day of June next. And I do hereby authorize any attorney of any court of record in Pennsylvania to appear for me and confess judgment for the above sum to the holder of this single bill, with costs of suit, hereby releasing all errors and waiving stay of execution and the right of inquisition on real estate; also waiving the right of having any of my property appraised which may be levied upon, by virtue of any execution issued for the above sum." *Gibson*, C. J. expressed the opinion of the court, that "A negotiable bill or note is a courier without luggage. It is requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it and destroy it. But a memorandum, which is merely directory or collateral, will not affect it. The warrant and stipulations incorporated with this note evince that the object of the parties was not a general, but a special one. Payment was to be made, not as is usual at so many days after date, but at a distant day certain; yet the negotiability of the note, if it had any, as well as its separate existence, was instantly liable to be merged in a judgment, and its circulation arrested by the debt being attached, as an encumbrance to the maker's land; and it was actually merged when it had nearly three months to run. Now it is hard to conceive how the commercial properties of a bill or note can be extinguished before it has come to maturity. That is not all. A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee, for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted. But it may be said that his transfer would be a waiver of the warrant as a security for himself or any one else; and that subsequent holders would take the note without it. The principle is certainly applicable to a memorandum indorsed after signing, or one written on a separate paper. But the appearance of paper with such unusual stipulations incorporated with it would be apt to startle commercial men as to their effect on the contract of indorsement, and make them reluctant to touch it. All this shows that these parties could not have intended to impress a commercial character on the note, dragging after it, as it would, a train of special provisions which would materially impede its circulation."

do not contain such words, there might be sufficient reason for supposing the paper not intended to be negotiable. And it seems that where a note purports on its face to be negotiable, and the payee indorses it in blank, and thus passes it to the holder as a negotiable note, he will be estopped from denying that it is such by reason of any collateral agreement connected with it.(*c*)

If such agreements are written on the same paper with the note, if they are not in the body of the note, it is not material where else they are written; and they are not, strictly speaking, a part of the note.(*d*) The law on this subject is as yet a little uncertain. It may be said, however, first, that if written subsequently to the note, they are no part of it, and can affect none but the parties; second, that, in the absence of a date or other evidence, they will be presumed to be simultaneous with the bill or note; (*e*) third, that if thus simultaneous with the bill or note, they are, as to all parties to whom they thus convey notice, obligatory. Still, however, it remains true, that some things, as place of payment, &c., are little more than advisory or permissive if on the margin or back, and more nearly obligatory if in the body of the note. But these clauses have already been considered.

(*c*) Hodges *v.* Shuler, 24 Barb. 68.

(*d*) Where the payee of a note, at the time of taking the note, signed an agreement underneath the same "to take the above note" in certain labor, if done within six months, there being no evidence that the promisor had ever performed or offered to perform the labor, and the six months having expired, it was held that the two instruments were not to be construed together as parts of the same contract, and that an indorsee might recover in his own name on the note. Odiorne *v.* Sargent, 6 N. H. 401.

(*e*) Fletcher *v.* Blodgett, 16 Vt. 26.

CHAPTER VII.

OF PAYMENT BY NEGOTIABLE BILL OR NOTE.

SECTION I.

OF THE PRESUMPTION OF LAW.

In 1809, the Supreme Court of Massachusetts said, "It has long been settled as law in this State, that a negotiable note given in consideration of a simple contract debt due is a discharge of the simple contract." The reason given was, that, if the original creditor or his representative could recover on the original debt, the debtor might still be obliged to pay the note to an innocent indorsee.(*a*) At that time (and until 1820) Maine was a part

(*a*) Thacher *v.* Dinsmore, 5 Mass. 299, per *Parsons*, C. J. The case of Warren, Administrator, is referred to, which was decided before the Revolution, by which it was determined that "the law will presume a negotiable note is agreed by the parties to be payment of a simple contract. . . . . The reason of the decision was, that the defendant might not be held to pay the money twice. . . . . The case does not, indeed, decide that the plaintiff may not encounter the presumption by proving an express agreement that the note should be received as collateral security." In Goodenow *v.* Tyler, 7 Mass. 38, (1810,) this is said to have been settled sixty years in Massachusetts. As it is to be much regretted that States should differ on so important a point of commercial law, (Wright *v.* First Crockery Ware Co., 1 N. H. 281, Wheeler *v.* Schroeder, 4 R. I. 383, 389,) we think the Massachusetts case deserves some examination. It seems to rest almost entirely on precedent; for it is noticeable, that the reason given is not that of the Chief Justice himself, but is quoted from the early case. It is not clear that it is necessary to presume that a negotiable promissory note is taken in payment of a simple contract debt, in order to protect the maker from having to pay the debt twice. See Sandford *v.* Dillaway, 10 Mass. 52, 2d ed., note by Mr. Rand, the editor. For where such transfer of negotiable paper is not regarded as presumptive evidence of payment, the debtor is protected by the credit which the transfer of the bill or note gives him. Okie *v.* Spencer, 2 Whart. 253. See Weakly *v.* Bell, 9 Watts, 273; Hardy *v.* Collector-General, 1 Hawaian, 272; Teaz *v.* Chrystie, 2 E. D. Smith, 621; Belshaw *v.* Bush, 11 C. B. 191; Johnson *v.* Weed, 9 Johns. 310; Black *v.* Zacharie, 3 How. 483. It is not necessary to plead the taking of a negotiable instrument as payment or satisfaction. In defence to an action for the debt, it is sufficient in pleading, that a bill or note payable to bearer or order was given for the debt due, which has been or is outstanding, or

of Massachusetts; and when it became an independent State,

in the hands of a third person. Kearslake *v.* Morgan, 5 T. R. 513; Griffiths *v.* Owen, 13 M. & W. 58; Price *v.* Price, 16 id. 232. See Mercer *v.* Cheese, 12 Law J., N. S. C. P. 56, 4 Man. & G. 804; Crisp *v.* Griffiths, 2 Cromp. M. & R. 159. And generally, in England as well as most of the United States, the note given must be produced and cancelled before a recovery will be allowed upon the original consideration. Champion *v.* Terry, 3 Brod. & B. 295; Davis *v.* Dodd, 4 Taunt. 602. In Dangerfield *v.* Wilby, 4 Esp. 159, Lord *Ellenborough* held, that under money counts a note given must be produced or shown to be lost or destroyed. In Hadwen *v.* Mendizabel, 10 J. B. Moore, 477, a suit was maintained for goods sold without producing the note given for the price, it being in the hands of the plaintiff's agent at the time; but it was said by Mr. Justice *Gaselee:* "The defendant may pay the amount of the verdict into court, and move that execution may be stayed until the bills are delivered up; but it appears to me that there is no ground to set aside the verdict of the jury." Though the creditor may recover when he has indorsed and had to take up the paper again himself, — Vice *v.* Anson, 3 C. & P. 19; Burden *v.* Halton, 4 Bing. 454, — it is held almost universally that the note given must be cancelled or given up by the holder. Kean *v.* Dufresne, 3 S. & R. 233; Lewis *v.* Manly, 2 Yeates, 200; Miller *v.* Lumsden, 16 Ill. 161; Holmes *v.* D'Camp, 1 Johns. 34; Pintard *v.* Tackington, 10 id. 104; Steamboat Charlotte *v.* Lumm, 9 Misso. 63; Hughes *v.* Wheeler, 8 Cowen, 77; Schimmelpennich *v.* Bayard, 1 Pet. 264; Rangler *v.* Morton, 4 Watts, 265. This seems to us to afford a perfect protection to the maker. But if the note be in the hands of the plaintiff at the time of the suit, there is no need to give it up or cancel it; for the plaintiff could not recover it himself, and if it were indorsed after maturity, all equities would be open between the maker and such indorsee after maturity which existed between the original parties. The Massachusetts cases decided since Thacher *v.* Dinsmore, 5 Mass. 211, are most of them collected *infra.* Greenwood *v.* Curtis, 4 Mass. 93; Maneely *v.* M'Gee, 6 id. 143; Goodenow *v.* Tyler, 7 id. 36; Chapman *v.* Durant, 10 id. 47; Thurston *v.* Blanchard, 22 Pick. 18; Whitcomb *v.* Williams, 4 id. 228; Reed *v.* Upton, 10 id. 522; Jones *v.* Kennedy, 11 id. 125; Watkins *v.* Hill, 8 id. 522; Butts *v.* Dean, 2 Met. 76; Huse *v.* Alexander, id. 157; Ilsley *v.* Jewett, id. 168; Phillips *v.* Blake, 1 Met. 156; Wood *v.* Bodwell, 12 Pick. 268; Cornwall *v.* Gould, 4 id. 444; Fowler *v.* Bush, 21 id. 230; French *v.* Price, 24 id. 13; Melledge *v.* Boston Iron Co., 5 Cush. 158; Rindge *v.* Breck, 10 Cush. 43. See Curtis *v.* Hubbard, 9 Met. 329. In both Maine and Massachusetts, the courts show a disposition to make the doctrine of payment as limited in its application as possible. In Zerrano *v.* Wilson, 8 Cush. 424, a bill was drawn on the owners by the master of a ship in a foreign port. If not accepted and paid and brought into court, it is no bar to the action for supplies against the owners. It is held to apply only to such paper as is negotiable. Greenwood *v.* Curtis, 4 Mass. 93; Maneely *v.* M'Gee, 6 id. 143; Trustees, &c. *v.* Kendrick, 12 Maine, 381; Bartlett *v.* Mayo, 33 id. 518; Jose *v.* Baker, 37 id. 465; Edmond *v.* Caldwell, 15 id. 340. The presumption of payment is also limited to cases in which the creditor abandons no security which he had before taking the paper. Pomroy *v.* Rice, 16 Pick. 22; Melledge *v.* Boston Iron Co, 5 Cush. 158; Butts *v.* Dean, 2 Met. 76; Fowler *v.* Ludwig, 34 Maine, 455; Page *v.* Hubbard, Sprague, 335. It would seem also to be limited to the notes of the party himself. See Melledge *v.* Boston Iron Co., 5 Cush. 158, which seems to be followed by the case of Fowler *v.* Ludwig, 34 Maine, 455. This seems to be in direct conflict with some late New York cases, which hold that the note of a third party may be payment of a previous debt; and if it be not indorsed by the debtor, this is strong evidence of payment. Whitbeck *v* Van

the same rule of law continued in force.(*b*) In all other parts

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Ness, 11 Johns. 409; Breed *v.* Cook, 15 id. 241; St. John *v.* Purdy, 1 Sandf. 9; Noel *v.* Murray, 1 Duer, 385, 3 Kern. 167. But that the debtor's own note cannot be payment of a previous debt, even if the parties expressly agree and intend that it shall be so. Cole *v.* Sackett, 1 Hill, 516. "The promissory note of a debtor, given for a precedent simple contract demand, will not operate as payment so as to preclude the creditor from suing on the original consideration, although given under an express agreement that it was to be received in full satisfaction and discharge; otherwise, if it be the note of a third person. In Butts *v.* Dean, 2 Met. 76, it was held, where a note if considered payment would have made void a bond, that it was not payment. So in Curtis *v.* Hubbard, 9 Met. 320, *Shaw*, C. J. says: "This is a presumption of fact which may be rebutted by evidence showing that it was not so intended; and the fact that such presumption would deprive the party who takes the note of a substantial benefit, has a tendency to show that it was not so intended." Coburn *v.* Kerswell, 35 Maine, 126, holds a statutory lien for personal services waived by the receipt of a negotiable instrument. This seems to conflict with the *dictum* of *Shaw*, C. J., in the Massachusetts case. Elwood *v.* Deifendorf, 5 Barb. 398. *Shaw*, C. J., in speaking, in Melledge *v.* Boston Iron Co., 5 Cush. 158, of the notes of a third party, must refer to a note indorsed, if at all, without recourse by the debtor; for if the debtor *indorsed* the note of a third party, he would be liable, and the creditor would have lost no security, since every indorsement is a new promise, and the creditor would have in addition to the debtor's liability that of another person. According to this *dictum* it would seem that the creditor is only limited to his better remedy in Massachusetts, while in other States he has his option. In no jurisdiction would resort probably be had to the original consideration, unless it were better than the promissory note given in exchange for it. It is also held in Massachusetts, that a promissory note is admissible in evidence to support money counts in a suit against the maker by the promisee or indorsee, or to support a claim in set-off for money paid. State Bank *v.* Hurd, 12 id. 172; Wild *v.* Fisher, 4 Pick. 421; Sargent *v.* Southgate, 5 id. 313. In Ramsdell *v* Soule, 12 Pick. 126, where a new note had been given for an old one, and proved worthless on account of usury, it was held that a recovery could be had on the original consideration. So Johnson *v* Johnson, 11 Mass. 359, 362. In Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237, where goods were purchased for a company, and a note given by an unauthorized agent, it was held that the agent was liable on the note, but that the company were still liable on the original debt. Slocumb *v.* Holmes, 1 How. Miss. 139, holds that, where a note is given to pay an account, no action will lie on the latter.

(*b*) In fact, the earliest case on this subject was decided in Kennebec County, so that the Massachusetts doctrine was peculiarly local law in Maine. Thacher *v.* Dinsmore, 5 Mass. 299. The later decisions in Maine are to be found in the following reports. Varner *v.* Nobleborough, 2 Greenl. 121; Wilkins *v.* Reed, 6 id. 220; Descadillas *v.* Harris, 8 id. 298; Gilmore *v.* Bussey, 12 Maine, 418; Comstock *v.* Smith, 23 id. 202; Fowler *v* Ludwig, 34 id. 455; Newall *v.* Hussey, 18 id. 249; Shumway *v.* Reed, 34 id. 560; Bangor *v.* Warren, id. 324; Gooding *v.* Morgan, 37 id. 419; Coburn *v.* Kerswell, 35 id. 126. The presumption seems to have been very much weakened in Maine by the later decisions. In Varner *v.* Nobleborough, 2 Greenl. 121, which is the earliest case upon the subject, it is said that the acceptance is not an irresistible bar to an action on the original contract, for the presumption may be rebutted. In Descadillas *v.* Harris, 8 Greenl. 298, the presumption is founded as in Massachusetts and England, and the rule in most States is admitted to be otherwise; but in Fowler *v.* Ludwig, 34 Maine, 455, it is

of this country, except Vermont,(*c*) and in the courts of England and the United States, the rule is otherwise.(*d*)

It is certainly a general rule of law, that one simple executory contract being substituted for another does not extinguish the

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said: "If the paper accepted is not binding upon all parties previously liable, or if the paper of a third person be received not expressly in payment, the presumption may be considered as repelled." Page *v.* Hubbard, 19 Law Reporter, 607, opinion of *Sprague*, J., sitting as referee. There is held to be no difference between bills and notes as to their effect in payment. Fowler *v.* Ludwig, 34 Maine, 455; Varner *v.* Nobleborough, 2 Greenl. 121. As to statutory liens, the Act of 1851, ch. 216, provides that "No such action or lien shall be defeated by reason of the plaintiff's having liquidated the amount due, and received a promissory note therefor, unless it shall have been expressly taken in discharge of the amount due, and of said lien." Coburn *v.* Kerswell, 35 Maine, 126.

(*c*) In Curtis *v.* Ingham, 2 Vt. 287, a note had been given by the debtor and a surety. It is not stated in the case, but it is probable, that the note was not negotiable Hutchins *v.* Olcutt, 4 Vt. 549; Torrey *v.* Baxter, 13 id. 452. *Redfield*, J. said: "Where the creditor accepts either the promissory note of his debtor or of a third person, in settlement of a previously unsettled matter of account or dealing between them, this, *prima facie*, is *payment*." Follett *v.* Steele, 16 Vt. 30; Farr *v.* Stevens, 26 Vt. 299; Dickinson *v.* King, 28 Vt. 378, per *Isham*, J.: "The doctrine is well settled in this State, that a promissory note given upon an open account operates as payment of that account, and is a bar to an action upon the original indebtedness, provided there is no fraud or unfairness in giving the note. The general rule is the same, whether the note is that of the debtor or of a third person. The remedy of the party in such case is only upon the new security." Collamer *v.* Langdon, 29 Vt. 32. See Torrey *v.* Baxter, 13 Vt. 452, which seems a little inconsistent with the previous and subsequent decisions. Gilman *v.* Peck, 11 Vt. 516. In the case of Tracy *v.* Pearl, 20 Vt. 162, and Heald *v.* Warren, 22 id. 410, it was held that, when an order or draft was drawn on a third person by a debtor to pay a given amount to the creditor, that such draft would not operate as payment when it was drawn without funds in the hands of the drawee, or if it was done as a mere matter of accommodation, such a draft will not merge the original claim, "for the best reason in the world, the parties did not so intend it." The giving of such a draft will be treated as a fraud.

(*d*) The principal cases on this point are the following. Mooring *v.* Marine Dock & Mut. Ins. Co., 27 Ala. 254; Costar *v.* Davies, 3 Eng. Ark. 213; Brewster *v.* Bours, 8 Calif. 501; Davidson *v.* Bridgeport, 8 Conn. 472; Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235; Mims *v.* McDowell, 4 Ga. 182; Miller *v.* Lumsden, 16 Ill. 161; Jones *v.* Ransom, 3 Ind. 327; Logan *v.* Attix, 7 Iowa, 77; Proctor *v.* Mather, 3 B. Mon. 353; Walton *v.* Bemiss, 16 La. 140; Berry *v.* Griffin, 10 Md. 27; Jennison *v.* Parker, 7 Mich. 355; Stam *v.* Kerr, 31 Missis. 199; Yarnell *v.* Anderson, 14 Misso. 619; Ward *v.* Howe, 38 N. H. 35; Coxe *v.* Hankinson, Coxe, 85; Vail *v.* Foster, 4 Comst. 312; Gordon *v.* Price, 10 Ired. 385; Merrick *v.* Bonry, 4 Ohio State, 60; McIntyre *v.* Kennedy, 29 Penn. State, 448; Wheeler *v.* Schroeder, 4 R. I. 383; Kelsey *v.* Rosborough, 2 Rich. 241; Union Bank of Tenn. *v.* Smiser, 1 Sneed, 501; McNeil *v.* McCamley, 6 Texas, 163. In Florida, Minnesota, Wisconsin, and Oregon, we are unable to find that this question has yet been decided. It is to be presumed that those States will follow the current of the authorities. In Indiana and Iowa the doctrine is only implied. The question has been long since considered settled in the courts of the United States. Clark *v.* Young, 1 Cranch, 181; Sheehy *v.* Mandeville, 6 id. 253;

latter.(*e*) But, nevertheless, a valid bill or note suspends any action on the contract in the discharge of which it is given, until the note is due; (*f*) and if the creditor receive money on the instrument, or be guilty of laches, the bill or note (*g*) operates

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Peter *v.* Beverly, 10 Pet. 532; Bank of U. S. *v.* Daniel, 12 id. 32; Downey *v.* Hicks, 14 How. 240; Gallagher *v.* Roberts, 2 Wash. C. C. 191; Denniston *v.* Imbrie, 3 id. 396: and in England, Ward *v.* Evans, 2 Ld. Raym. 928; Clark *v.* Mundal, 1 Salk. 124; Anonymous, 12 Mod. 408; Anonymous, id. 517; Marsh *v.* Pedder, Holt, N. P. 72; Puckford *v.* Maxwell, 6 T. R. 52; Owenson *v.* Morse, 7 id 64; Barclay *v.* Gooch, 2 Esp. 571; Mussen *v.* Price, 4 East, 147; Scott *v.* Surman, Willes, 400; Hickling *v.* Hardey, 7 Taunt. 312; Robinson *v.* Read, 9 B. & C. 449; Smith *v.* Wilson, Andr. 187; Bedford *v.* Deakin, 2 B. & Ald. 210; Champion *v.* Terry, 3 Brod. & B 295; Belshaw *v.* Bush, 11 C. B. 191; Hadwen *v.* Mendisabal, 2 C. & P. 20; James *v.* Williams, 13 M. & W. 828; Griffiths *v.* Owen, id. 58; Maillard *v.* Duke of Argyle, 6 Man. & G. 40. Such also is the French law. No system of law, which is founded upon the Roman civil law, considers a bill or note extinguishment of a prior debt, unless there be an express agreement to that effect. Wallace *v.* Agry, 4 Mason, 336, 344; Pothier on Ob., p. 3, ch. 2, art. 2; 1 Domat, B. 4, tit. 3, § 1, p. 491. The same rule of law seems to be followed in the Sandwich Islands. Hardy *v.* Collector-General, 1 Hawaian, 272, which was a case of mandamus against the collector-general of customs to show cause why he should not be compelled to grant a passport to the plaintiff. The statute provides that no passport shall be granted to any person or persons of whose indebtedness notice shall be given to the collector in writing. It was held that taking or giving a negotiable promissory note in settlement of an account is not a payment or extinguishment of the debt, but merely changes its form, and postpones the time of payment. The mandamus was refused.

(*e*) Roades *v.* Barnes, 1 Burr. 9; Cumber *v.* Wane, 1 Stra. 426. "One simple contract does not merge or extinguish another." Bill *v.* Porter, 9 Conn. 23. "It is clear that a subsisting simple contract is not discharged or extinguished by the acceptance of another simple contract for the same consideration by the same party. Johnson *v.* Johnson, 11 Mass. 359." See Manhood *v.* Crick, Cro. Eliz. 716; Higgens's Case, 6 R. 45; Gregory *v.* Thomas, 20 Wend 17; Phelps *v.* Johnson, 8 Johns. 54; Preston *v.* Perton, Cro. Eliz. 817. See also cases under note *d*.

(*f*) Putnam *v.* Lewis, 8 Johns. 389; Kearslake *v.* Morgan, 5 T. R. 513; Stedman *v.* Gooch, 1 Esp. 3; Hardy *v.* Collector-General, 1 Hawaian, 272; Teaz *v.* Chrystie, 2 E. D. Smith, 621; Belshaw *v.* Bush, 11 C. B. 191; Black *v.* Zacharie, 3 How. 483; Griffiths *v.* Owen, 13 M. & W. 58; Price *v.* Price, 16 id. 232; Mercer *v.* Cheese, 12 Law J., N. S., C. P. 56, 4 Man. & G. 804; Crisp *v.* Griffiths, 2 Cromp. M. & R. 159; M'Dowall *v.* Boyd, 17 Law J., Q. B. 295; James *v.* Williams, 13 M. & W. 828; Van Eps *v.* Dillaye, 6 Barb. 244.

(*g*) Hoar *v.* Clute, 15 Johns. 224; Gordon *v.* Price, 10 Ired. 385; Denniston *v.* Imbrie, 3 Wash. C. C. 396, Dougal *v.* Cowles, 5 Day, 511; Smith *v.* Smith, 7 Foster, 244; Elwood *v.* Deifendorf, 5 Barb. 398; Thompson *v.* Briggs, 8 Foster, 40; Hart *v.* Boller, 15 S. & R. 162; M'Ginn *v.* Holmes, 2 Watts, 121; Woodcock *v.* Bennet, 1 Cowen, 711; Chastain *v.* Johnson, 2 Bailey, 574; Morgan *v.* Bitzenberger, 3 Gill, 350; Bill *v.* Porter, 9 Conn. 23; Weed *v.* Snow, 3 McLean, 265; Hays *v.* Stone, 7 Hill, 128; Gardner *v.* Gorham, 1 Doug. Mich. 507; Kelsey *v.* Rosborough, 2 Rich. 241; McConnell *v.* Stettinius, 2 Gilman, 707; Steamboat Charlotte *v.* Hammond, 9 Misso. 58; Cave *v.* Hall, 5 id. 59; Watson *v.* Owens, 1 Rich. 111; Chamberlyn *v.* Delarive, 2 Wils. 353;

as a complete satisfaction.(*h*) When in payment of a debt the creditor is content to take a bill or note, payable at a future day, this is, at the least, an agreement for delay; and he cannot legally commence an action on the original debt until that delay terminates; or until the bill or note becomes payable and default is made in the payment. But the bill or note received must have some value, or there is no consideration for the promise of delay. If, for example, it be drawn upon a person who has no effects of the drawer's in his hands, and who therefore refuses to accept it, the creditor may consider it as so much waste paper, and resort at once to his action on the original demand.(*i*)

By this rule, taking a note or bill of exchange only gives the debtor credit till the paper falls due.(*j*) And even an unsatisfied judgment on the bill or note will not destroy the original debt; (*k*) nor will a note be payment or a discharge of the origi-

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Smith *v.* Wilson, Andr. 187, id. 228; Tobey *v.* Barber, 5 Johns. 68; Dayton *v.* Trull, 23 Wend. 345; Clark *v.* Young, 1 Cranch, 181; Livingston *v.* Radcliff, 6 Barb. 201; Snyder *v.* Findley, Coxe, 248.

(*h*) Stat. 3 & 4 Anne, ch. 9, § 7. Sibree *v.* Tripp, 15 Law J., Exch. 318, 15 M. & W. 23; Gray *v.* Fowler, 1 H. Bl. 463; Robinson *v.* Bland, 2 Burr. 1077. See also cases in the previous note. The statute quoted *supra* declares that, "If any person doth accept any such bill of exchange for, and in satisfaction of, any former debt or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of such bill for his debt doth not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment."

(*i*) Stedman *v.* Gooch, 1 Esp. 3; Kearslake *v.* Morgan, 5 T. R. 513; Popley *v.* Ashly, 6 Mod. 147. In Tarleton *v.* Allhusen, 2 A. & E. 32, it was held that, if a judgment on the bill were unsatisfied, the debt would still remain. Popley *v.* Ashly, 6 Mod. 147; Ward *v.* Evans, 2 Ld. Raym. 928; Hickling *v.* Hardey, 7 Taunt. 312; Bishop *v.* Rowe, 3 Maule & S. 362; Buckler *v.* Moor, 1 Mod. 89. It was held that, if the bill given for goods supplied was worthless, by reason of there being no effects in the hands of the drawee, the creditor could resort to the original consideration. Puckford *v.* Maxwell, 6 T. R. 52; Bolton *v.* Richard, id. 139; Ex parte Blackburne, 10 Ves. 204; Brown *v.* Kewley, 2 B. & P. 518; Ex parte Dickson, cited 6 T. R. 142; Harley *v.* Greenwood, 5 B. & Ald. 95; Tapley *v.* Martens, 8 T. R. 451; Strong *v.* Hart, 2 Car. & P. 55, 6 B. & C. 160, 9 D. & R. 189; Wyatt *v.* Hertford, 3 East, 147; Marsh *v.* Pedder, 4 Camp. 257, Holt, N. P. 72; Taylor *v.* Briggs, Moody & M. 28; Shepard *v.* De Bernales, 13 East, 565; Bolton *v.* Reichard, 1 Esp. 106; Robinson *v.* Read, 9 B. & C. 449, 4 Man. & R. 349; Reed *v.* White, 5 Esp. 122; Ilsley *v.* Jewett, 2 Met. 168.

(*j*) Okie *v.* Spencer, 2 Whart. 253, and cases under note *a*, p. 150, and *passim*, *supra*.

(*k*) Tarleton *v.* Allhusen, 2 A. & E. 32, *supra*.

nal debt, if the holder discount it, provided he afterwards has to pay it.(*l*)

The presumption of payment by bill or note may be considered in two ways: first, as to contemporaneous debts; second, as to prior or precedent debts. When, at the time of sale or of the contracting of a debt, a note or bill is given in payment thereof, it may be that of a third person, or of the debtor himself. If the note of a third person be given, the presumption would seem to be that it was intended as payment absolutely, by the understanding of the parties, unless evidence can be introduced to show that it is merely conditional payment, or a collateral security for the debt.

If the party's own note be given at the time of the sale or contract, there is much more doubt.(*m*) It seems to be substan-

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(*l*) Kean *v.* Dufresne, 3 S. & R. 233. See also *supra*, p. 150, note *a*, and cases cited.

(*m*) In Clerk *v.* Mundall, 12 Mod. 203, 1 Salk. 124, Lord *Holt* held, that if "A sells B goods, and B gives a bill in satisfaction thereof, then, though this bill be not paid, B is discharged, for it is a part of the original contract that B should take the bill." So if a party discounts notes with a banker, and others are taken without indorsement, the banker is not liable if they turn out bad. Fydell *v.* Clark, 1 Esp. 447. Again, Lord *Holt* said, in Ward *v.* Evans, 2 Ld. Raym. 928: "I agree the difference taken by my brother Darnall, that taking a note for goods sold is a payment because it was part of the original contract, but paper is no payment where there is a precedent debt." The distinction between prior and contemporaneous debts is sometimes very fine in the English decisions. In Camidge *v.* Allenby, 6 B. & C. 373, corn was sold the defendant on the morning of Saturday. On the same day, at three o'clock in the afternoon, the defendant delivered bills to the plaintiff, payable by certain bankers who had failed that morning at eleven o'clock. *Bayley*, J. said: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril." But this doctrine does not seem to have been always followed. In Porter *v.* Talcott, 1 Cowen, 359, decided in 1823, which is quite a leading case, it was said that there was no difference as to preceding and contemporaneous debts (to the same effect is the *dictum* of *Whittlesey*, J., in Monroe *v.* Hoff, 5 Denio, 362); and that the note of the debtor and of a third party stood on precisely the same ground, and that there must be an express agreement shown in the case of the contemporaneous debt as well as in that of the prior one. But in Rew *v.* Barber, 3 Cowen, 272, a little later, it was held that the note of a third person, given at the time of the sale of a chattel, was payment and satisfaction. See also Whitbeck *v.* Van Ness, 11 Johns. 409; Breed *v.* Cook, 15 id. 241. But again in Corlies *v.* Cumming, 6 Cowen, 181: "It is well settled that giving a promissory note for goods sold is not a payment or extinguishment of the demand, unless such was the agreement of the parties." A late case, Noel *v.* Murray, 1 Duer, 385, 3 Kern. 167, holds that giving a note of a third party, at the time of the sale and delivery of the goods, raises a presumption that it is taken in payment, and this may be considered the law of New

tially selling a note by barter, or exchanging it for goods. And we can hardly conceive of a bill being taken at the time of the sale, unless it be the understanding of the parties to regard it as payment. The remedy on the note or bill, which is more convenient to the creditor, is all that should be allowed him; for there is no sufficient reason for allowing resort to be had to the original consideration.

If, however, cash were agreed upon at the time of the sale, and in its stead a check or bill is given, it is then only taken for the convenience of the debtor, and if it be not productive, there is no payment of the debt.(*n*) On this principle the peculiar law of checks and drafts, which has been fully considered, will be found to depend.

When a note or bill is given for a prior debt, there are several cases, presenting slight differences. The debtor may give his bill on a third party, and it may or may not be accepted by the

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York at the present time. St. John *v.* Purdy, 1 Sandf. 9. In Wright *v.* First Crockery Ware Co., 1 N. H. 281, it was held, "if a creditor receives the note or bill of his debtor, or of a third person indorsed by the debtor, either for a precedent debt or a debt arising at the time, it is not presumed it has been received in satisfaction." Mooring *v.* Marine Dock, &c. Co., 27 Ala. 254. The negotiable note of the debtor is not payment when taken either at or after the time of contracting the debt. *Gibson*, C. J., in Bayard *v.* Shunk, 1 Watts & S. 92, says: "Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence." With regard to the notes of third persons passed at the time of a sale, it seems from the cases in this note that there is no warranty, if the notes are not indorsed, of the past or future solvency of the parties to the note. Bicknall *v.* Waterman, 5 R. I. 43; Burgess *v.* Chapin, id. 225; Beckwith *v.* Farnum, id. 230. In Gardner *v.* Gorham, 1 Doug. Mich. 507, it was held, that giving a promissory note or other security for goods sold is no payment, unless it is specially agreed to be so taken. But in this case, of which we have quoted the substance of the head-note, there was some evidence offered to show that the plaintiff took the notes, relying upon the representations of the defendant. So in Bill *v.* Porter, 9 Conn. 29. Giving and receiving a promissory negotiable note for goods sold, in the absence of any agreement to accept it as payment, is not an extinguishment of the original cause of action. See Dougal *v.* Cowles, 5 Day, 511; Johnson *v.* Weed, 9 Johns. 310, per *Kent*, C. J. In Gordon *v.* Price, 10 Ired. 385, a note of a third person is said to be payment, if so intended, "as, for example, if passed when a purchase is made." But in New York, in 1854, in Soffe *v.* Gallagher, 3 E. D. Smith, 507, it is said, by *Woodruff*, J.: "I understand the rule to be well settled, that taking the note of a purchaser of goods sold, or the note of a debtor for a pre-existing debt, is never deemed payment."

(*n*) Owenson *v.* Morse, 7 T. R. 64.

drawee. He may give the note of a third person, and this may or may not be indorsed by the debtor himself. He may give the bill of a third party, indorsed or unindorsed by the debtor, and this may or may not have been accepted. There seems to be no settled distinction taken by most of the cases on this subject with regard to the strength of the presumption in the cases supposed.

In those States where the common-law rule obtains, we should think that *payment* by bill or note, as an absolute satisfaction, should be more readily established in the case where the paper of a third person is given, than where it is the party's own note.(*o*) For where the note or bill of a third person is given, there seems to have passed to the creditor a new security, and a new liability is pledged, and the debtor has parted with that which may be supposed to have cost him money or value.

Taking new notes seems to resemble novation in the civil law.

In the case where a debtor's bill on a third party is not accepted, there should be very strong evidence, and stronger than in any other case, that the bill was received in payment, and taken at the risk of the creditor. If acceptance be refused by the drawee, especially if he had no funds in his hands, we doubt if the bill, though taken in absolute payment, would not become, as already intimated, like waste paper, and leave the creditor to his original contract.

This question comes more properly under Checks and Drafts, where we have considered it.

The bill or note of a third party, unindorsed by the debtor, seems to work a novation ; (*p*) but if it be indorsed, the creditor

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(*o*) See *contra*, *dictum* of *Shaw*, C. J. in Melledge *v.* Boston Iron Co., 5 Cush. 158, *supra*, note *a*, p. 152 ; but in confirmation, the late New York cases, quoted *infra*, p. 159, note *t* ; Boyd *v.* Hitchcock, 20 Johns. 76.

(*p*) In Bank of England *v.* Newman, Bull., N. P. 277, 1 Ld. Raym. 442, 12 Mod. 241, Lord *Holt* laid down this rule: "If a man give such a bill for money not due before, *without indorsement*, it is a sale of the bill." This bill was drawn by Bellamy, payable to Newman or bearer. Bellamy did not pay, and assumpsit was brought against Newman, who had not indorsed. The case implies that the practice may have been different among bankers. Hartop *v.* Hoare, 3 Atk. 51 ; Fydell *v.* Clark, 1 Esp. 447. Where, in the discount of notes, other bills and notes were taken without indorsement, it was held that the transferee took the latter at his own risk. So if a bill or note is delivered without indorsement at the time of a sale, but not in payment of a pre-existing debt, such exchange of a note for goods or money amounts to a sale or barter of the note, and the rule of *caveat emptor* applies. The transferee takes at his own risk. Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391,

is certainly no worse off for having the security remaining of the debtor himself, besides the new paper; for it is clear that, if a debtor give additional security, it may operate as an accord and satisfaction. But some late cases in New York take the ground that there is not a novation when the note is indorsed, for the reason that the indorsement by the debtor goes far to show that the original liability is retained.(*q*)

By recent decisions in Massachusetts and Maine, it would seem that the rule of those States was only that negotiable paper should be deemed payment unless a contrary intention could be shown.(*r*) On the other hand, in New York and the other States, it is only held that negotiable paper shall not be deemed payment without sufficient evidence that it was so intended or so agreed by the parties, or unless the laches of the creditor has proved an injury to the debtor.(*s*) And recently the courts of New York seem disposed to deny that the debtor's own promissory note shall be held to pay or extinguish the debt, even where that was intended and agreed upon by the parties, on the ground of the want of consideration.(*t*) If we may exclude the

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Ward *v.* Evans, 2 Ld. Raym. 928; Brown *v.* Kewley, 2 B. & P. 518; Patton *v.* Ash, 7 S. & R. 116; People *v.* Howell, 4 Johns. 296; Dennie *v.* Hart, 2 Pick. 204; Bayard *v.* Shunk, 1 Watts & S. 92. The rule of course is different, where the transferee is induced by the fraudulent representations of the transferrer. Such negotiable paper is no payment or satisfaction. Pierce *v.* Drake, 15 Johns. 475; Martin *v.* Pennock, 2 Barr. 376; Snyder *v.* Findley, Coxe, 48.

(*q*) See also Soffe *v.* Gallagher, 3 E. D. Smith, 507, 513; Boyd *v.* Hitchcock, 20 Johns. 76; Shriner *v.* Keller, 25 Penn. State, 61.

(*r*) See *supra*, notes *a* and *b*.

(*s*) See *supra*, note *g*.

(*t*) Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 id. 448; Elwood *v.* Deifendorf, 5 Barb. 398. A strong opinion is given by *Cowen*, J., in Cole *v.* Sackett. Frisbie *v.* Larned, 21 Wend. 450, is a case a little earlier, having been decided in 1839; and in this the same doctrine is laid down by the same judge. In Elwood *v.* Deifendorf, 5 Barb. 398, the doctrine of Cole *v.* Sackett is mentioned; and in Waydell *v.* Luer, 5 Hill, 448, it was fully reconsidered and approved, the same judge again delivering the decision of the Supreme Court. The case of Waydell *v.* Luer was carried to the Court of Errors, 3 Denio, 410, in 1846, and the decision reversed, but on grounds overruling the principle laid down by Judge Cowen, as to the party's own note in payment of a precedent debt. The same view seems to be taken, in the Court of Appeals, in the case of Hill *v.* Beebe, 3 Kern. 556. The opinion was delivered by *Comstock*, J., and the cases of Cole *v.* Sackett and Waydell *v.* Luer were commented on and approved, and Hawley *v.* Foote, 19 Wend. 516, and Frisbie *v.* Larned, *supra*, referred to; in which case a plea, that an order drawn by the defendant on a third person was accepted, by agreement, in full satisfaction, was on demurrer adjudged by *Bronson*, J. bad in substance. See also Soffe *v.* Gallagher, 3 E. D. Smith, 507, which is a very strong case, and

late New York cases, the question seems to be reduced to one of the burden of proof. And there is no valid objection, as we think, to the principle which gives to this transfer of negotiable paper the effect which the parties intended; and the authorities

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Booth *v.* Smith, 3 Wend. 66; Hughes *v.* Wheeler, 8 Cowen, 77; Burdick *v.* Green, 15 Johns. 247; Conkling *v.* King, 10 Barb. 372; James *v.* Hackley, 16 Johns. 273; Galoupeau *v.* Ketchum, 3 E. D. Smith, 175; Vail *v.* Foster, 4 Comst. 312. The law on this point seems to be fully settled in New York; but, although they hold that a promise to receive a promise in satisfaction is a *nudum pactum*, and that the debtor's own promissory note cannot be payment, even by express agreement, yet, in the case of Myers *v.* Welles, 5 Hill, 463, it was decided that receiving the principal debtor's own promissory note, negotiable and payable at a future time, was such a giving of time upon the demand as discharged the surety. *Cowen*, J., who had delivered the opinion in Waydell *v.* Luer, on page 448 of the same volume, agrees to this. The law, however, is perfectly well established, that the acceptance by a creditor of the note of a third person in full satisfaction of an existing debt is an extinguishment of the original indebtedness, though the note so taken be for a less sum than the whole debt. Conkling *v.* King, 6 Seld. 440. It would seem to follow, that these advantages constitute a legal consideration; and if sufficient to sustain an agreement to give time, why are they not considerations for any other lawful agreement? for the existence of a consideration is quite sufficient for the court; of its adequateness the parties are to judge for themselves. In the other States of the Union, though the validity of an agreement to make the note of a debtor a bar to any action on the original consideration, it seems generally to have been taken for granted. No marked distinction seems to have been made between the note of the debtor for the preceding debt, a note in substitution or renewal of a former one, or a note of a third person. In all cases the intention of the parties seems to control. Bank of the Commonwealth *v.* Letcher, 3 J J. Marsh. 195; Letcher *v.* Bank of the Commonwealth, 1 Dana, 82. In some of the New York cases, it is held that a promissory note is "*prima facie*, *sub modo*, payment," which may be rebutted by producing the note at the trial, to be cancelled. Pintard *v.* Tackington, 10 Johns. 104; Waydell *v.* Luer, 3 Denio, 410. The New York cases are admitted by their courts to be irreconcilable with those of England, per *Duer*, J., Francia *v.* Del Banco, 2 Duer, 133. In almost all the States except New York, we suppose the note or bill of the debtor, or of a third party, may be payment by *implied* as well as *express* agreement; for there is no reason why the parties should not indicate their intentions by actions as well as words. Where an implied agreement may be shown that the bill or note was taken in payment, all the facts are to be considered by the jury. Fulford *v.* Johnson, 15 Ala. 385; Hart *v.* Boller, 15 S. & R. 162; Merrick *v.* Boury, 4 Ohio State, 60; Steamboat Charlotte *v.* Hammond, 9 Misso. 58; Bullen *v.* McGillicuddy, 2 Dana, 90; Trotter *v.* Crockett, 2 Port. Ala. 401, 411; Mason *v.* Wickersham, 4 W. & S. 100. See also cases cited *infra*. In the following cases it has been held that the agreement may be *express* or *implied*. Fulford *v.* Johnson, 15 Ala. 384; Cocke *v.* Chaney, 14 id. 65; Sanders *v.* Branch Bank, 13 id. 353; Slocomb *v.* Lurty, 1 Hempst. C C. 431; Stone *v.* Chamberlin, 20 Ga 259; Chambers *v.* McDowell, 4 id 185; Miller *v.* Lumsden, 16 Ill. 161; Bullen *v.* McGillicuddy, 2 Dana, 90; Berry *v.* Griffin, 10 Md. 27; Crawford *v.* Berry, 6 Gill & J. 63, 71; Yates *v.* Donaldson, 5 Md. 389; Slocumb *v.* Holmes, 1 How. Miss. 139; Johnson *v.* Cleaves, 15 N. H. 332; Coxe *v.* Hankinson, Coxe, 85; Gordon *v.* Price, 10 Ired. 385; Merrick *v.* Bonry, 4 Ohio State, 60; Hart *v.* Boller, 15 S. & R. 162; Walton *v.* Bemiss, 16 La. 140. In the following cases it has been held that the agree-

seem to be coming together in support of this view. There must always, or nearly always, be some evidence of this intent in the circumstances of the case, or in the conduct of the parties. But where there is no evidence outside the paper itself, we cannot

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ment must be express. Brewster *v.* Bours, 8 Calif. 501; Dougal *v.* Cowles, 5 Day, 511; Gardner *v.* Gorham, 1 Doug. Mich. 507; Jaffrey *v.* Cornish, 10 N. H. 505; Conkling *v.* King, 10 Barb. 372; Van Eps *v.* Dillaye, 6 id. 244; Artcher *v.* Zeh, 5 Hill, 200; Hays *v.* Stone, 7 id. 128; Muldon *v.* Whillock, 1 Cowen, 290; Barelli *v.* Brown, 1 McCord, 449; Glenn *v.* Smith, 2 Gill & J. 493. In some cases it is held the agreement must be "*special.*" Downey *v.* Hicks, 14 How. 240, 249; Chastain *v.* Johnson, 2 Bailey, 574; Kelsey *v.* Rosborough, 2 Rich. 241. We state that an express or implied agreement between the parties would be sufficient in most of the States to make a note or bill payment of a prior debt. Those decisions which hold that the agreement must be express will frequently be found to be qualified in later determinations of the same courts, and it will be observed that citations from the courts of some States will be found in the list of cases requiring an express agreement, and of those also which hold that the agreement may be implied as well. Moreover, the cases which determine that the agreement must be express go further than their facts justify, and the question might, we think, be presented to any court in the United States, except those of New York, whether a negotiable instrument may not be payment by the agreement of the parties, implied from their acts in the premises. In determining whether or not there was an agreement, express or implied, to accept a negotiable promissory note in payment, receipts are almost always considered by the counsel and the court. The general rule of law, that a receipt may be contradicted, varied, or explained by oral testimony, is allowed to obtain to its fullest extent. In some cases, where the receipt given for a note expresses that it is "payment in full," "as money," &c., it has been allowed of itself to be presumptive evidence of an agreement. See Maine, Massachusetts, and Vermont cases, in previous notes. Hutchins *v.* Olcutt, 4 Vt. 549. Where a receipt expresses "to be in full when paid," it is clear that the note is not intended as payment of the debt, but only a conditional satisfaction. Proctor *v.* Mather, 3 B. Mon. 353; Sutton *v.* The Albatross, 2 Wallace, Jr. 327; Chapman *v.* Steinmetz, 1 Dallas, 261; Smith *v.* Rogers, 17 Johns. 452; Howard *v.* Thomas, 3 La. 109; Goodrich *v.* Barney, 2 Vt. 422. So in Thompson *v.* Briggs, 8 Foster, 40, a receipt of the account of a creditor, thus, "Rec'd note of" (the surviving partners), — will not give it the effect of a payment. Such receipts are also allowed to have some weight; but in the case of receipts which indicate satisfaction and discharge, the court seem to refuse them even the weight to which they are entitled as evidences of the party's interest. In Putnam *v.* Lewis, 8 Johns. 389, the plaintiff, having a claim against the estate of the defendants, intestate, received the defendant's note for the amount, and gave him the following receipt: "Received of Geo. R. Lewis $53.96, it being in full of all demands which I have against the estate of Eber Lewis, deceased." The note was not mentioned in the receipt, and therefore might seem to be treated as money, but was held not to extinguish the debt. In Glenn *v.* Smith, 2 G. & J. 493, the following receipt was given: "Received of Mrs. Ann Haslett, &c., two promissory notes, &c., in payment of the above account." *Buchanan*, C. J. says: "To give to the acceptance of a note the effect of absolute payment or extinguishment of a debt, a contract that it should be so must be shown; an *express* agreement to receive it as payment, and to run the risk of its being paid, — which is not sufficiently done by the receipt in this case to justify us in saying that the claim of John Heslip against the estate

but think that the nature and purposes of negotiable paper would lead to the conclusion that it was used as a substitute for money, or rather as money, and that payment by such paper should be equivalent to payment by money; but this is not the prevailing view.

Where such transfer is *not* payment, we have seen that the debtor is protected by the credit which the transfer of a bill or note payable at a future day gives him. Without putting in the plea of payment or satisfaction in answer to an action on a debt

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of William Haslett was extinguished by his acceptance of Ann Haslett's notes." In Berry *v.* Griffin, 10 Md. 27, it is said: "If any legal principle can be well settled by repeated uniform decisions, the cases which have been referred to must be sufficient to show that where an account is due, and the creditor receives from his debtor a promissory note 'in payment of the account,' giving a receipt in those terms, the note is not a satisfaction or extinguishment of the original claim, unless there be evidence in addition to the receipt, for the purpose of proving an agreement that the creditor was to receive the note *as payment*, and to run the risk of being paid." So in Muldon *v.* Whitlock, 1 Cowen, 290, *Sutherland*, J. said: "Nor does the taking a note and giving a receipt for so much cash in full of the original debt amount to evidence of such express agreement to take the note in payment." In Steamboat Charlotte *v.* Hammond, 9 Misso. 58, a receipt in full was held not to be decisive. "It might still have been understood, consistently with the words of it, that the note was received in full under the usual condition of its being a good note"; "and besides," adds the judge, "receipts have always been held open to explanation by parol evidence." See Johnson *v.* Weed, 9 Johns. 310; Tobey *v.* Barber, 5 id. 68, to the same effect; also, Frisbie *v.* Larned, 21 Wend. 450; N. Y. State Bank *v.* Fletcher, 5 id. 85; Booth *v.* Smith, 3 id. 66. In Noel *v.* Murray, 1 Duer, 385, it was held that, where the note of a third person had been taken as payment at the time of a sale, the legal inference was, that it was in final payment, and a receipt in full may be contradicted, if at all, only by showing an express agreement to take it only as collateral security. In Dogan *v.* Ashbey, 1 Rich. 36, it seems that a receipt was allowed its full weight as evidence, so long as it was not contradicted. The law in Louisiana differs from that of the other States with regard to the force of receipts; for although, as in the other States, the creditors receiving other notes in renewal of those due, — Hobson *v.* Davidson, 8 Mart. La. 431, — or a bill of exchange for a precedent debt, — Turner *v.* Hickey, 15 Mart. La. 256, Cox *v.* Baldwin, 1 La. 401, — or for money upon open account or any other contract, — Glasgow *v.* Stevenson, 18 Mart. La. 568, — does not operate a novation. Yet where the creditor "*receives in payment of his debt*" either the note of his debtor or that of a third person, it is a novation of the debt, which is thereby extinguished, with all its accessory rights and privileges; and the remedy of the creditor will be confined to a personal action against the parties to the note or draft. Barron *v.* How, 14 Mart. La. 144; Abat *v.* Nolté, 18 Mart. La. 636; Hunt *v.* Boyd, 2 La. 109; Walton *v.* Bemiss, 16 id. 140; Cammack *v.* Griffin, 2 La. Ann. 175; Lee *v.* Sewall, id. 940; White *v.* McDowell, 4 id. 543. In Ocean Tow Boat Co. *v.* Ship Ophelia, 11 La. Ann. 28, the plaintiffs were directed to apply to the agents of the defendants for payment. The agents gave plaintiffs a check, for which it appears a receipt in full was given. The check was dishonored. Held, defendants were not discharged, checks standing on a peculiar ground in this respect, and being held not like notes or bills of a third person.

for which a note has been given, it is only necessary to allege that such negotiable paper was given for the debt due, and is still running, or is in the hands of a third party.(*u*)

If the note be paid before or at maturity, this would be an answer to the action. If not presented at maturity, and *negotiated afterwards*, and then recovery should be had on the original debt, these circumstances would open the equities between the original debtor and creditor, and the indorsee after maturity must stand in the place of the latter, who clearly could not recover on the note after he had recovered on the original debt.

The usage and law of Massachusetts, as stated by the supreme court, rests upon the hardship of double payment; and this does not seem to be a sufficient foundation. A distinction is also made between giving a note in payment of a contemporaneous or concurrent debt, — when goods, for example, are delivered at the same time a note is given, and a note or bill given for an antecedent debt. We have intimated that the former is presumed to be payment, and it is not supposed that any other contract is contemplated by the parties. In the latter case, the paper is only payment when honored. A very general statement may be made on the authority of the cases already cited, to the effect that the note of a third person, given for a debt contracted at the time, with no evidence of intent, is presumed to be satisfaction.(*v*) When given for a precedent debt, it is presumed to be collateral security, except in Massachusetts, Maine, and Vermont, where the presumption is that it is a satisfaction and settlement of the outstanding account. It must, however, be remembered that these presumptions may be met by other presumptions, or by evidence of intent or contract, and so rebutted.

When a party is bound by a contract under seal, and a note or bill is taken by the creditor, the remedy on the specialty is not suspended unless the bill be paid; nor would such a bill be an extinguishment, although judgment had been obtained upon it.(*w*)

So a note taken for arrears of rent would not prevent the

(*u*) See note *a*, *supra*, p. 150.

(*v*) Bayard *v.* Shunk, 1 Watts & S. 92; Butts *v.* Dean, 2 Met. 76; Maynard *v.* Johnson, 4 Ala. 116; Noel *v.* Murray, 3 Kern. 167; Willson *v.* Foree, 6 Johns. 110; Snyder *v.* Findley, Coxe, 48; Bicknall *v.* Waterman, 5 R. I. 43; Burgess *v.* Chapin, id. 225; Beckwith *v.* Farnum, id. 230.

(*w*) Drake *v.* Mitchell, 3 East, 251; Curtis *v.* Rush, 2 Ves. & B. 416.

landlord's distraining.(x) So in the payment of dishonored bills, if notes or other bills are given which are not paid at maturity, the liability on the dishonored bill revives.(y) And it revives on the old bill also, if the new bill, though paid at maturity, be not large enough to cover the principal and interest of the dishonored bill.(z)

Where the inference that a note or bill received is taken as payment rests upon evidence, it would seem from some cases that this evidence must be very strong, because it receives no help from presumption. Thus, in a case where the cashier of a bank, on a note which fell due, accepted a new note, and a check of a third person which was dishonored, it was held that, though he had surrendered the old note, there was no payment of it, and the amount of the check could be recovered.(a) And in another similar case, where a bank had entered the note on its books as paid, the bank was allowed to sue on the note thus entered, and show that the check was not taken as payment.(b)

SECTION II.

OF THE DISCHARGE OF EQUITABLE AND MARITIME LIENS BY TAKING BILL OR NOTE.

Liens at common law depend upon possession; (c) and when the chattel to which the lien attaches is given to the debtor, and

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(x) Harris *v.* Shipway, 1744, cited by Byles, p. 304, note *i;* Ewer *v.* Clifton, Bull. N. P. 182; Palfrey *v.* Baker, 3 Price, 572; Davis *v.* Gyde, 2 A. & E. 623, 4 Nev. & M. 462. Even a bond given for rent does not extinguish it. Rent, though on a parol lease, is of as high a nature as an obligation. Phillips *v.* Lee, 11 Vin. Abr. 289.

(y) Ex parte Barclay, 7 Ves. 597. Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced. The Lord Chancellor said: "If two bills are dishonored, and two others are given 'in lieu' of them, but the former are allowed to remain in the hands of the holder, that fact will give a construction to the words 'in lieu,' and the meaning will be only in case they are paid."

(z) In Lumley *v.* Musgrave, 4 Bing. N. C. 9, 5 Scott, 230, where the defendants asked time and gave a new bill, the plaintiff retaining the old bill, and claiming that something was due on the old bill for interest, it was held the plaintiff could maintain assumpsit on the old bill.

(a) Olcott *v.* Rathbone, 5 Wend. 490.

(b) Pratt *v.* Foote, 12 Barb. 209.

(c) Jordan *v.* James, 5 Ohio, 88; Tooke *v.* Hollingworth, 5 T. R. 215; Williams *v*

credit given to him, the lien is held to be waived.(*d*) Because as a lien is but the right of continued possession, when the thing to which a lien attaches is voluntarily surrendered, the lien is gone. But when a thing to which a lien attaches remains in the hands of the owner of the lien until a note or bill falls due, if the note be then dishonored the lien will be revived.

For example, if, before goods are delivered, the note of the buyer for them in the vendor's hands is dishonored, the lien will not be defeated.(*e*)

Moore, 5 N. H. 235; Bloxam *v.* Sanders, 4 B. & C. 941; Townley *v.* Crump, 4 A. & E. 58; Hostler's Case, Yelverton, Metcalf's ed. 67; Heywood *v.* Waring, 4 Camp. 291, per Lord *Ellenborough:* "Without possession there can be no lien; a lien is a right to hold; and how can that be held which was never possessed?" Wolf *v.* Summers, 2 Camp. 631; Hartley *v.* Hitchcock, 1 Stark. 408. See also Chase *v.* Westmore, 5 M. & S. 180; Hollis *v.* Claridge, 4 Taunt. 807.

(*d*) Yelverton, Metcalf's ed. 67, d. In Cowell *v.* Simpson, 16 Ves. 275, where the question how far the taking of a subsequent security was a waiver of the lien of a solicitor on his client's papers for a balance of an account, was much discussed. The whole reasoning of Lord *Eldon* proceeds on the ground, not that an express contract of itself destroys the lien, but such an express contract (whether antecedent or subsequent is wholly immaterial) as involves terms inconsistent with a lien; as a contract for taking a security payable in future, or for giving credit, or for a particular mode of payment. In Hutton *v.* Bragg, 2 Marsh. 339, *Gibbs*, C. J. said: "I have always been inclined to consider this doctrine as applicable to an agreement which is inconsistent with the right of lien. . . . . If there be an agreement to pay by bills, such agreement takes away the right of lien." Ex parte Lewis, 2 Gallis. 483; Schooner Volunteer, 1 Sum. 551. This rule agrees with that of the civil law. By that law, if credit be given by the vendor of goods, his lien is gone, upon the ground that a credit is inconsistent with a lien. Dig., Lib. 18, tit. 1, ch. 19. So in the Year-book, 5 Ed. IV., 2, pl. 20. *Nota* also by *Hayden*, that a hostler may detain a horse if his master will not pay for his meat. The same law, as if a tailor made a garment for me, he may retain the garment until he is paid for his labor. And the same law, if I buy a horse of you for 20*s.*, but *if I am to pay you at Michaelmas next following*, then you cannot detain the same until you are paid. S. P. 17 Ed. IV. 1. Hutchins *v.* Olcutt, 4 Vt. 549. In this case it was held that a lien depending on possession was defeated by taking a promissory note *on demand*, which of course is due the moment it is made, without any demand. This must rest in part on the peculiar law of Vermont. For exactly the opposite is determined in Clark *v.* Draper, 19 N. H. 419. See, in general, Raitt *v.* Mitchell, 4 Camp. 146; Brook *v.* Wentworth, 3 Anst. 881; Chase *v.* Westmore, 5 M. & S. 180.

(*e*) New *v.* Swain, 1 Danson & L. 193. A purchaser having agreed to leave the goods in the warehouse of the vendor and pay a certain rent for the room, when the bill, which he gave in payment according to the bargain, was dishonored, it was held that the vendor had still a right of retainer until payment of the price. Hurry *v.* Mangles, 1 Camp. 452, was cited, in which, after a sale, the goods remained in the warehouse of the vendor at a rent. It was held by Lord *Ellenborough*, that the right of stoppage *in transitu* was gone. In this last case the oil in question was sold to J. S., who gave his acceptances at six months, and on the first day of August following sold out to the

Yet at any time before the note fell due the vendee might have demanded his goods, and the lien of the vendor would have been considered as waived by the credit given by taking a bill or note, unless the right of possession as a security was expressly reserved. For otherwise delivery before payment was contemplated by the parties. But if a note should be negotiated, though outstanding dishonored in the banker's hands, this would be sufficient evidence of a relinquishment of lien, and the buyer could demand the goods, although the note was not paid.(*f*)

The negotiation of a note taken for the price of real property does not, however, work a waiver of the vendor's lien on the land, in those jurisdictions where this equitable lien in favor of the vendor exists.(*g*)

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plaintiff, who brought trover; the defendants refused to deliver the oil till they were paid for it, saying that J. S. had become insolvent before the acceptances were due. Harman *v.* Anderson, 2 Camp. 243. In New *v.* Swain, *supra*, Lord *Tenterden* said: "We are all of the opinion that, on non-payment of the bill, the defendant ought to retain the goods." See Owenson *v.* Morse, 7 T. R. 64; Bunney *v.* Poyntz, 4 B. & Ad. 568, 1 Nev. & M. 229, per *Littledale*, J.; Townley *v.* Crump, 4 A. & E. 58. It was held in Barrett *v.* Goddard, 3 Mason, 107, that when the seller agreed to become warehouseman for the vendee his right of stoppage was gone. See Hammond *v.* Anderson, 4 B. & P. 69. In Townley *v.* Crump, 4 A. & E. 58, it was held, as between the original vendor and vendee, a lien is not diverted by the former giving the latter a delivery order for the goods sold, but remaining in the vendor's warehouse rent free, although it appeared that, by the usage of trade in Liverpool, where the parties dealt, goods sold while in warehouse are delivered by the vendor's handing to the vendee a delivery order, and that the holder of such order may obtain credit with the purchaser as having possession of the goods.

(*f*) Bunney *v.* Poyntz, 4 B. & Ad. 568, 1 Nev. & M. 229, per *Denman* and *Tenterden*, C. JJ. and *Parke*, J.; Barrett *v.* Goddard, 3 Mason, 107, per *Story*, J.: "The payment was by a note on time. Now giving such a credit for the price under such circumstances is decisive against any implied right of retainer or lien for the price."

(*g*) Ex parte Loaring, 2 Rose, 79. A vendor was held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. Lord *Eldon*, Ch said: "That the note was discounted amounts to nothing; it was incidental to the nature of the security, and did not vary what it in substance was, — evidence of an intention to pay at four months. I do not believe that either of the parties had this refined equity in their contemplation; but I do not feel that I can refuse to give effect to it." In Grant *v.* Mills, 2 Ves. & B. 306, a vendor's lien was not discharged by taking bills drawn by one member, and accepted by a firm. The Master of the Rolls said: "The effect of a security of a third person has never been decided, but I concur with Lord *Redesdale*, that bills of exchange are not *security*, but a *mode* of *payment*." A purchaser has to show that, from the circumstances of the case, no lien was intended to be reserved, — as by taking other real or personal security, or that the case is one where the object of the sale is a collateral benefit. Chapman *v.* Tanner, 1 Vern. 267; Austen *v.* Halsey, 6 Ves. 475, 483; Hughes *v.* Kearney,

A somewhat similar question has arisen in the case of maritime liens. It is not unusual for the debtor to give bills or notes, and then it may be doubted whether the giving and accepting of negotiable paper has not converted the debt into a

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1 Sch. & L. 132; Meigs *v.* Dimock, 6 Conn. 458; Stafford *v.* Van Rensselaer, 9 Cowen, 316; Marsh *v.* Turner, 4 Misso. 253; Deibler *v.* Barwick, 4 Blackf. 339; Bayley *v.* Greenleaf, 7 Wheat. 46; Magruder *v.* Peter, 11 Gill & J. 217; Carroll *v.* Van Rensselaer, Harring. Ch. Mich. 226. The jurisdictions where the equitable lien of the vendor on land exists are indicated by the following cases. Cole *v.* Scot, 2 Wash. Va. 141; Cox *v.* Fenwick, 3 Bibb, 183; Garson *v.* Green, 1 Johns. Ch 308; Fish *v.* Howland, 1 Paige, 20; Warner *v.* Van Alstyne, 3 id. 513; Bayley *v.* Greenleaf, 7 Wheat. 46; Gilman *v.* Brown, 1 Mason, 191; Watson *v.* Wells, 5 Conn. 468; Jackman *v.* Hallock, 1 Ohio, 318; Patterson *v.* Johnson, 7 id. 225; Sheratz *v.* Nicodemus, 7 Yerg. 9; Wynne *v.* Alston, 1 Dev. Eq. 163; Lagow *v.* Badollet, 1 Blackf. 416; Vandoren *v.* Todd, 2 Green, Ch., N. J. 397; Burns *v.* Taylor, 23 Ala. 255; Pinchain *v.* Collard, 13 Texas, 333; Salmon *v.* Hoffman, 2 Calif. 138; Truesdell *v.* Callaway, 6 Misso. 605; Marsh *v.* Turner, 4 Misso. 253; Fisher *v.* Johnson, 5 Ind. 492; Kennedy *v.* Woolfolk, 3 Hayw. 199. But the doctrine in Pennsylvania is, that the lien does not exist against a judgment creditor. Semple *v* Burd, 7 S. & R. 286. It is said not to be adopted to its full extent in Connecticut. Atwood *v.* Vincent, 17 Conn. 583 It does not exist in Massachusetts, Gilman *v.* Brown, 1 Mason, 191; or in North Carolina, Womble *v.* Battle, 3 Ired. Eq. 182. In Vermont, there is no lien by law (1851, p. 42), unless given by deed. Much discussion has arisen as to what facts or what security would amount to a waiver of the lien. It has been held, that taking a bond from the vendee for the purchase-money, or the unpaid part of it, operated as waiver; the weight of authority seems to be, that taking a note, bond, or covenant for the payment of the note, is not of itself an act of waiver of the lien. Winter *v.* Anson, 3 Russ. 488; Lagow *v.* Badollet, 1 Blackf 416; Vandoren *v* Todd, 2 Green, Ch., N. J. 397; Eskridge *v.* M'Clure, 2 Yerg. 84; Ross *v.* Whitson, 6 id. 50; Magruder *v.* Peter, 11 Gill & J. 217. Fawell *v.* Heelis, 2 Amb. 724, decided that taking a bond waived the lien Lord *Apsley*, Chancellor, said: "If a vendor parts with his estate, and takes a security for the consideration money, there is no reason for a court of equity to assist him against the creditors of the purchaser." In Hughes *v.* Kearney, 1 Sch. & L. 132, it was held that the note was not a waiver of the lien, and the case was distinguished from Bond *v.* Kent, 2 Vern. 281, on the ground of intention of the parties varying. Mackreth *v.* Symmons, 15 Ves. 329 By the Roman law, taking a security for the debt was of itself a waiver and extinguishment of the lien; but this is not so in America. 2 Story, Eq. Jur. § 1226; Hatcher *v* Hatcher, 1 Rand. 53; Johnson *v.* Thompson, 4 J. J. Marsh. 380; Garson *v.* Greene, 1 Johns. Ch. 308; Cox *v.* Fenwick, 3 Bibb, 183. Taking a note, bill, or bond with distinct security, or taking distinct security alone, as real or personal property, or taking the responsibility of a third person, is evidence that the seller did not repose on the lien. Gilman *v.* Brown, 1 Mason, 191, 4 Wheat. 255; Capper *v.* Spottiswoode, Tamlyn, 21; Williams *v.* Roberts, 5 Ohio, 35; Eskridge *v.* M'Clure, 2 Yerg. 84; Foster *v.* Trustees of Athenæum, 3 Ala. 302; Wragg *v.* Comptroller-General, &c., 2 Desauss. 509. In Winter *v.* Anson, 1 Sim. & S. 434, it was held that there is no lien when a bond is given, payable at a future day, for the purchase-money, with interest. See cases *supra*. *Contra*, White *v.* Casanave, 1 Harris & J. 106; Cox *v.* Fenwick, 3 Bibb, 183. In Kenny *v.* Collins, 4 Littell, 289, it was held that a bond for the purchase-money, when assigned, transfers the lien of the assignor to the assignee, if the former has any. Eubank *v.* Poston

mere personal debt, and discharged any maritime lien upon the ship or cargo as security. It would seem that the acceptance of negotiable paper would operate to destroy such maritime liens only so far as they depend on possession; as, for example, the

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5 T. B. Mon. 285; Johnson *v.* Groathney, 4 Littell, 317. But see Inglehart *v.* Armiger, 1 Bland, 519. So a note, Edwards *v.* Bohannon, 2 Dana, 98; Woods *v.* Bailey, 3 Fla. 41. But not so where the note was indorsed without recourse. If a vendor transfers the note taken, and guarantees the payment, no lien passes. Taking the guaranty is such additional security as defeats the lien. Woods *v.* Bailey, 3 Fla. 41; Schnebly *v.* Ragan, 7 Gill & J. 120. The distinction seems to be taken between the promise by note, bond, or covenant of the debtor himself, and that of a third party; the latter shows that dependence is placed, not on the lien, but on what is taken to secure payment. As in Magruder *v.* Peter, 11 Gill & J. 217, the promissory note of the debtor, with an indorser, was held no payment so as to waive the lien. See Coster *v.* Bank of Georgia, 24 Ala. 37; Griggsby *v.* Hair, 25 id. 327; Slack *v.* McLagan, 15 Ill. 242. In Nairn *v.* Prose, 6 Ves. 759, taking a deposit of stock was held a waiver of the lien. In Lagow *v.* Badollet, 1 Blackf. 416, it was held that the vendor of real estate does not waive his lien by taking a note or bond from the vendee, unless some distinct security is also taken, either of the property or responsibility of a third person, as a mortgage. Young *v.* Wood, 11 B. Mon. 23. In Sugden's Vendors, 57, it is generally stated that the lien is not waived by the purchaser's obligation. Pinchain *v.* Collard, 13 Texas, 333. See Frail *v.* Ellis, 16 Beav. 350, 17 Eng. L. & Eq. 457, where it was held that a special contract must be explicit to deprive a vendor of his lien upon land sold. But the vendor's lien is waived by taking a new security, — as the vendee's note, with the security of a third person, White *v.* Dougherty, Mart. & Y. 309; Woods *v.* Bailey, 3 Fla. 41; Boon *v.* Murphy, 6 Blackf. 272; or the note of a third party alone, which is presumed to be payment, Sears *v.* Smith, 2 Mich. 243; Vail *v.* Foster, 4 Comst. 312; Muir *v.* Cross, 10 B. Mon. 277; Trustees of Schools *v.* Wright, 11 Ill. 603. If the vendor receive a worthless note by fraud or mistake, the lien remains on the land. Shelton *v.* Tiffin, 6 How. 163. If the vendee's note be given for the purchase-money and renewed, the lien remains; but if that note be exchanged for that of a third party, the lien is extinguished. Muir *v.* Cross, 10 B. Mon. 277. The waiver of the vendor's lien is a question for the jury, but taking negotiable paper is not at all conclusive, nor is a certificate of deposit. Mims *v.* Macon & W. R. R., 3 Ga. 333. A mere change in the form of indebtedness, or evidence of it, is not generally a waiver, unless so intended. Lewis *v.* Starke, 10 Smedes & M. 120. See Hoggatt *v.* Wade, 10 Smedes & M. 143. In Grant *v.* Mills, 2 Ves & B. 306, it was held that a bill of exchange drawn by the vendee, and accepted by him and his partner, did not waive the lien; but we doubt whether this decision of the Master of the Rolls is correct, the later and higher authorities being the other way. Gilman *v.* Brown, 1 Mason, 191, 4 Wheat. 255, per *Marshall*, C. J.; Williams *v.* Roberts, 5 Ohio, 35; Eskridge *v.* M'Clure, 2 Yerg. 84; Foster *v.* Trustees of Athenæum, 3 Ala. 302. In Williams *v.* Roberts, 5 Ohio, 35, it was held that "the vendor of land, who makes a conveyance and takes notes with personal security for the purchase-money, does not retain a lien on the land for that purchase-money." In Brown *v.* Gilman, 1 Mason, 191, 214, *Story*, J. says: "On a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor take a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a security or indorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists upon the land itself." Elliot *v.*

lien of the ship-owner on the cargo for his freight money,(*h*) or the lien on the cargo for contribution in general average, which liens often depend upon possession; (*i*) for such paper gives credit at least till it falls due, and to liens which depend on possession such credit is fatal, and is construed to be a waiver, and has been so held in many cases.(*j*)

Edwards, 3 Bos. & P. 181, which may seem to be opposed to this rule, was decided upon a stipulation against assignment or underletting, unless by express license. Cox *v.* Fenwick, 3 Bibb, 183. Held, that a vendor's lien on land may be waived where the vendor takes a distinct and independent security for the purchase-money, or when from other circumstances it is clearly inferable that the vendor does not rely upon the lien on the land. The taking of a bond has, however, been held not to be such a security, and is no waiver of a lien. By no fair presumption can such a waiver be presumed. Garson *v.* Green, 1 Johns. Ch. 308. "Taking a note for the purchase-money does not affect the vendor's lien"; but when the vendor of lands takes the security (a note) of a third person for the purchase-money, he has no equitable lien on the land. Vail *v.* Foster, 4 Comst. 312. In the case of a mechanic's lien, for which a note was given and indorsed, and then pursued to judgment by the indorsee, it was held that the claimant could not recover by producing the note alone to be cancelled; the judgment debt must be satisfied. This would seem to show that the indorsement and dishonor could not affect the lien of the vendor on a sale. Teaz *v.* Chrystie, 2 E. D. Smith, 621. See Miller *v.* Moore, 1 E. D. Smith, 739; Gridley *v.* Rowland, id. 670. If, as in the case of Edwards *v.* Bohannon, 2 Dana, 98, the vendor of land assigns the notes, and the lien is found existing in the assignee's hands, it is plain that the assignment of the note has not destroyed the lien. In White *v.* Williams, 1 Paige, 502, it was held that where, upon a sale of lands, the negotiable note of the purchaser is given for the purchase-money, the vendor retains an equitable lien upon the land; but an indorsee is not, from the mere transfer of the note, entitled to the benefit of such lien when the indorser has not been made liable upon the indorsement.

(*h*) 1 Parsons, Mar. Law, 125, note 1, cases cited. In Horncastle *v.* Farran, 3 B. & Ald. 497, an owner of a ship had a lien on goods till the delivery of good and approved bills of exchange for the freight. After objecting to a bill, he took it, and negotiated it, and this was held an approval and relinquishment of his lien on the goods. *Gibbs*, C. J. held, if payment were to be made by bills, this was inconsistent with the existence of a lien. In the case of The Cargo of the Ship Anna Kimball, U. S. D. C., Mass., 1861, 23 Law Reporter, 724, it was held, where the owner of a vessel took notes of the charterer for the balance of the charter-money, payable after the time when the ship was expected to arrive, that the lien on the goods for the freight was waived.

(*i*) In Cutler *v.* Rae, 7 How. 729, it was held that an action *in personam* by the owner of the vessel against the owner of the cargo, for a general average contribution, would not lie after the cargo had been delivered up, on the ground that the lien was lost by delivery up of the cargo. See comments on this case, 1 Parsons, Mar. Law, 511.

(*j*) See cases quoted at the beginning of the Section. Birley *v.* Gladstone, 3 Maule & S. 205, 2 Meriv. 401; Mitchell *v.* Scaife, 4 Camp. 298; Raitt *v.* Mitchell, 4 id. 146; Schooner Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 id. 589; Phillips *v.* Rodie, 15 East, 547; Cock *v.* Taylor, 13 id. 399; Horncastle *v.* Farran, 3 B. & Ald. 497; Horncastle *v.* Farran, 2 Stark. 590; Crawshay *v.* Homfray, 4 B. & Ald. 50; Christie *v.* Lewis, 2 Brod. & B. 410. See Horncastle *v.* Farran, *supra*.

By maritime liens we mean those liens or claims which arise from marine service or contracts, which attach to a particular thing, creating a tacit hypothecation, and which may be enforced in admiralty courts by proceedings *in rem*. They may or may not depend on possession.

Most maritime liens are, we hold, more like the *privilegia* of the civil law than the mere common-law liens. It is quite certain, at least in this country, that all maritime liens are not dependent on possession, nor are they a mere extension of the right of possession.(*k*) In nature as well as derivation they are more like the lien of a vendor of real estate, of which we have spoken above, and to which they are compared by Mr. Justice Story.(*l*) And in these cases, it is settled that giving credit does not destroy the lien, although there is a *personal* credit, and a personal indebtedness or security from the vendee to the vendor, in addition to the lien. Indeed, the modern maritime law gives the lien as auxiliary to personal security, and therefore personal liability does not destroy it. It would follow that the giving of negotiable paper does not extinguish a maritime lien, except in the cases before mentioned.(*m*)

(*k*) Harmer *v.* Bell, 7 Moore, P. C. 267, 22 Eng. L & Eq. 62; Ex parte Shank, 1 Atk. 234; Watkinson *v.* Bernadiston, 2 P. Wms. 367; Westerdell *v.* Dale, 7 T. R. 306; Justin *v.* Ballam, 1 Salk. 34; Brig Nestor, 1 Sumner, 73; Schooner Volunteer, id. 551; Germain *v.* Steam-tug Indiana, 11 Ill. 535; The Gold-Hunter, Blatchf. & H. 300; The Boston, id. 309; The Grafton, Olcott, 43, 1 Blatchf. C. C. 173; The Paragon, Ware, 322; The Phebe, id. 263; Hewett *v.* Buck, 17 Maine, 147; The Waldo, Daveis, 161; The Brig Casco, id. 184; Rich *v.* Lambert, 12 How. 347; The Calisto, Daveis, 29; Read *v.* Hull of a New Brig, 1 Story, 244; The Schooner Marion, 1 Story, 68; Davis *v.* New Brig, Gilp. 473; Peyroux *v.* Howard, 7 Pet. 324; St. Jago de Cuba, 9 Wheat. 409; The General Smith, 4 id. 438; Buddington *v.* Stewart, 14 Conn. 404; Davis *v.* Child, Daveis, 71. Parting possession when there is a lien, if consistent with the contract, does not waive it. Spaulding *v.* Adams, 32 Maine, 211. See also 1 Parsons, Mar. Law, 502. This is in the case of liens created by contract; and where possession is not at all of the essence of the contract, or of the lien as created by law, there is no reason that the loss of possession should be an evidence of waiver.

(*l*) The Brig Nestor, 1 Sumner, 73, 86.

(*m*) The Brig Nestor, 1 Sumner, 73, per *Story*, J. In The Active, Olcott, 286, it is held, that merely giving a note for supplies is no waiver of the lien, and the case would not be different if the note were that of an agent. See Moore *v.* The Fashion, 1 Newb. Adm. 49, and Moore *v.* Newbury, 6 McLean, 472. In both of these cases there was a bill for supplies presented by a collecting clerk, who agreed to give time on receiving a note; in one case a third party joined in the note. Held, that by the notes there was no waiver of lien. The case of Ramsay *v.* Allegre, 12 Wheat. 611, does not conflict with

A decision in the Circuit Court of the United States for Maine rests somewhat on the peculiar care which admiralty takes of

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the doctrine in the text. A material man had received a negotiable promissory note at four months. It had not been paid, but was outstanding, and had not been surrendered; it did not appear that it had *not* been negotiated. The District Court dismissed the libel, on the ground that the jurisdiction of the court, as an Instance Court of Admiralty, was waived by acceptance of a promissory note. *Marshall*, C. J. said, that "as it did not appear by the record that the note had been tendered to be given up, or actually surrendered at the hearing in the court below, the decree would be affirmed." See the remarks of *Story*, J. on this case, in The Brig Nestor, 1 Sumner, 73. The language of Mr. Justice Story, in the case of the Nestor, would imply that taking the note was a waiver of the maritime lien; but the decision did not require this *dictum*, as appears below. Nor, it is to be observed, did the decision of the lower courts or of the Supreme Court, in Ramsay *v.* Allegre, go upon the ground of payment by bill or note operating a discharge of the maritime lien. If we pursue Mr. Justice Story's analogy, we find that equitable liens are not discharged by a promissory note, nor does it appear why maritime liens should be. The William Money, 2 Hagg. Adm. 136 In this case also it appears that a seaman took a bill of exchange on the ship-owners for the amount of his wages, and the ship was discharged; but it appeared that the seaman preferred the bill to cash, and the election made it payment. See Leland *v.* The Medora, 2 Wood. & M. 92, as to what may be a waiver of a lien for supplies and stores furnished, and how far a promissory note may act as waiver of the lien. The learned judge stated that he had never known a lien to be enforced after the expiration of the credit in the negotiable paper, if such be given. No doubt the lien may be waived, and taking negotiable paper by way of personal security may be some evidence of waiver or relinquishment of lien. The waiver is a fact for the court to settle on all the evidence. Stevens *v.* The Sandwich, 1 Pet. Adm. 233, note; Peyroux *v.* Howard, 7 Pet. 324; Raitt *v.* Mitchell, 4 Camp. 146; Hutton *v.* Bragg, 2 Marsh. 339. But in these cases there appear to be required as evidence acts inconsistent with a lien. The note or bill of a master or owner has been held not to discharge a maritime lien. In the Eastern Star, Ware, 184, a sailor received a non-negotiable order as payment of wages. Judge *Ware* said: "Even if he had made the draft payable to order, which he did not, I should have hesitated long before holding it to be a discharge of the wages, under the presumption of the local law of the State (Maine), that a negotiable instrument is intended to be a discharge of a pre-existing debt. But as the drafts were not negotiable, they would not be held payment, under the local law, between merchant and merchant." In Spencer *v.* Bailey, 1 Hawaian, 124, it was held, that receiving bills of exchange for supplies in a foreign port was a presumption that they were taken in payment therefor; but that presumption may be rebutted by proof that the bills were not taken as absolute payment, and if they are dishonored, they are no bar to a suit upon the original account. North *v.* Brig Eagle, Bull. 78. The master drew a bill for supplies on one of the owners; the receipt was "in full when paid." Held that the lien was not discharged. Bark Chusan, 2 Story, 455. In this case the libellants, being ship-chandlers, furnished supplies in New York, and there took a note of one of the owners for them. Held, that the *lex loci* of New York governed, and the note taken was only a conditional payment. From this it would follow, that, if a note were given for supplies in Massachusetts, the *lex loci contractus* must then apply, and the note would be a discharge of the lien. But, as we have seen, in Massachusetts the presumption is rebutted where, by taking a note, a lien or other

seamen.(*n*) For it was held that a negotiable note given to a seaman left his lien on the ship undisturbed, unless the effect of the note in discharging the lien was explained to him and agreed to, and some other security or advantage given to him by way of compensation for the loss of his lien.(*o*)

In loans on bottomry, any contract or security for the absolute payment of the loan, in the case of the loss of the ship, invali-

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security would be lost. But the decision of Judge Story did not require him to regard the *lex loci contractus*, and the decision is extra-judicial. Had he confined himself to the presumption of payment by the general law, to which the Massachusetts and Maine law is admitted to be an exception, it would have been sufficient for the purposes of the case. A question then arises, which may be thus stated. A ship is repaired in New York. She belongs to B, who resides in Massachusetts. In payment B gives his negotiable promissory note, payable in Massachusetts, and receives a receipt in full. If made payable in New York, it could not be held payment, even if so intended by the parties. If the lien were contracted in Massachusetts, according to Judge Story the lien would be discharged. *Shaw*, C. J. *contra*. The question then arises, whether the note being made payable in Massachusetts operates as a novation of the contract, and makes a note operate as a discharge. We think that when in discharge or in connection with a marine contract a note is given made payable on land at some particular place, that nevertheless the contract is maritime with regard to the rights of the parties and the evidence which must be considered in giving effect to the note. It is clear that the lien can only be enforced in the Admiralty Court, and the lien which is given by the maritime law must be regulated by that law with regard to its creation, duration, and waiver, and the presumptions of the latter and the intentions of the parties must be regulated by admiralty rules of evidence. Again, it seems that the lien gained in New York ought not to be waived, unless it is so intended by the New York party, and he cannot be supposed to intend a waiver of his lien, that being the contrary of the presumption of the New York law; but if it were urged that the Massachusetts law must govern, and that ignorance of law is no excuse, the answer is plain, that the ignorance of the Massachusetts law is ignorance of foreign law, which is put upon the same ground as ignorance of fact, and will be relieved against in equity. Moreover, in Descadillas *v.* Harris, 8 Greenl. 298, the courts of Maine hold that a negotiable security given in a foreign country is not to be regarded here as an extinguishment of a simple contract debt, unless made so by the laws of that country. But it is almost settled, as will be perceived, that a maritime lien acquired in Massachusetts, and for which a note is there given, will not thereby be waived. In Page *v.* Hubbard, Sprague, 335, Mr. Justice Sprague, of the District Court of the United States for Massachusetts, was referee, and decided that a maritime lien for materials furnished a vessel built in Massachusetts is not lost by the creditors taking the debtor's negotiable promissory note, which is produced at the hearing and offered to be cancelled. This, moreover, was a lien created by the Massachusetts statute of 1855, ch. 231, which ought to be defeated by accepting a note, if any lien in Massachusetts were to be so defeated. The referee also rests upon the Massachusetts cases. See Sutton *v.* The Albatross, 2 Wallace, Jr. 527.

(*n*) Brown *v.* Lull, 2 Sumner, 443.

(*o*) The Betsy & Rhoda, Davcis, 113. See also The Eastern Star, Ware, 184.

dates the bond, because it is of the essence of this contract, that the loss of the ship pays the debt.(*p*)

A bottomry bond differs from other liens (maritime or other), as well as *privilegia*, in this respect, that there is no personal liability connected with it, and that the only remedy is against the ship.(*q*)

Additional security is allowed, however, if it only makes the payment of the bond, when the ship arrives safely, more certain, but will give no claim to money, provided the ship does not arrive.(*r*)

It seems to be well settled that the taking of bills of exchange in connection with the bond, either as security for the bond or as secured by the bond, does not invalidate the bond, provided they are also subject to the same risk of payment by the loss of the ship.(*s*)

(*p*) 1 Parsons, Mar. Law, 407, note 1; The Atlas, 2 Hagg. Adm. 48; Jennings *v.* Ins. Co. of Penn., 4 Binn. 244; Greeley *v.* Waterhouse, 19 Maine, 9; Rucher *v.* Conyngham, 2 Pet. Adm. 295, 303; The Brig Draco, 2 Sumner, 157; Bray *v.* Bates, 9 Met. 237; The William & Emmeline, Blatchf. & H. Adm. 66; The Brig Atlantic, 1 Newb. Adm. 514; The Emancipation, 1 W. Rob. 124; Stainbank *v.* Fenning, 11 C. B. 51, 6 Eng. L. & Eq. 412; The Nelson, 1 Hagg. Adm. 169, 1 Stuart, Lower Canada, 130. In the Atlantic, 1 Newb. Adm. 514, a bond contained the following stipulation: "It is understood and agreed that the said W. & Co. do not take upon themselves the marine risks usual in cases of bottomry and hypothecation"; and it was held that it wanted the essential characteristic of bottomry bond, and could not be enforced *in rem* in admiralty. The drawing of the bill could not help the matter, since it was merely collateral to the bond.

(*q*) Stainbank *v.* Shepard, 13 C. B. 418, 20 Eng. L. & Eq. 547. *Parke*, B. said: "But the law forbids the creditor to have a direct remedy on the bond itself against the owner as well as the ship." Nostra Senora del Carmine, 29 Eng. L. & Eq. 572. See, however, in Bray *v.* Bates, 9 Met. 237, the opinion of *Hubbard*, J. In The Nelson, 1 Hagg. Adm. 169, Lord *Stowell* said: "To the bond exhibited here some objections are taken respecting its form, but not affecting its validity. One objection is, that it binds the owners personally, as well as the ship and freight, *which it cannot do.* . . . . The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners, in others not; and where they do not, though the form of the bond affects to bind the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation." The Virgin, 8 Pet. 538, 554. See also 1 Parsons, Mar. Law, 420, note 4.

(*r*) Thorndike *v* Stone, 11 Pick. 183; Stainbank *v.* Shepard, 13 C. B. 418, 20 Eng. L. & Eq. 547; The Atlantic, 1 Newb. Adm. 514, *supra*.

(*s*) The Emancipation, 1 W. Rob. 124. Dr. *Lushington* said: "Now, looking to the terms in which the bond is thus drawn up, it is clear in the first place upon the face of it, that it was given as a security for the bills of exchange which had been drawn by the master upon his owners. This circumstance, however, would not affect its validity under the principles laid down by the court in former cases." And in the case of the

If the bill of exchange drawn on the owner be paid, the bottomry bond must be void, and only ordinary interest is paid; but if such bills are dishonored, the bottomry bond comes into effect, and the risk of the loss of the ship, and the failure to pay the bills of exchange, is repaid by the marine interest. Bills of exchange might be drawn secured by a mortgage on the ship, and we do not see why a bottomry bond might not supply the place of a mortgage.(*t*)

Tartar, 1 Hagg. Adm. 1, it was also held that a bottomry bond, indorsed as collateral security for bills of exchange, would not be vitiated in consequence of such an indorsement. Stainbank *v.* Shepard, 13 C. B. 418, 20 Eng. L. & Eq. 547; The Ariadne, 1 W. Rob. 411, 421, per Dr. *Lushington*: "It is a common practice in transactions of bottomry for the lender to require the twofold security of a bill of exchange in addition to the bond; in such cases, the rule is to present the bill of exchange in the first instance, and if there is reason to believe that it will be paid, the bond is not put in suit. This rule is not inconsistent with the suggestion that the bond of bottomry is the original and primary security; for when the expression is used, that the bond is the primary, and the bill of exchange a collateral security, it only means that the transaction is originally a transaction of bottomry, and the bill of exchange is given as an additional and more negotiable security." See also The Jane, 1 Dods. 461, per Sir *W. Scott*. "But it is said that bills were given at the same time, and therefore that the lender looked to them, and not to the ship; but this is the usual practice; there is no inconsistency in taking such a collateral security, nor has it been ever held to exclude the bond or diminish its solidity." It is said that if a bill of exchange be taken of a consignee or agent for the amount, it is *prima facie* evidence that he looks to that rather than to the vessel. Ex parte Halkett, 3 Ves. & B. 135; The Wm. Money, 2 Hagg. Adm. 136; Murray *v.* Lazarus, 1 Paine, C. C. 572; Ramsay *v.* Allegre, 12 Wheat. 611. See The Augusta, 1 Dods. 283; The Tartar, 1 Hagg. Adm. 1, cited *supra;* Leland *v.* Ship Medora, 2 Woodb. & M. 92; The Lord Cochrane, 2 W. Rob. 320. In The Schooner Zephyr, 3 Mason, 341, is an opinion by *Story*, J., in which the principle stated in the text is fully recognized. The Brig Atlantic, 1 Newb. Adm. 514; Greely *v.* Smith, 3 Woodb. & M. 236; The Kennersley Castle, 3 Hagg. Adm. 1; The St. Catherine, id. 250; The Hunter, Ware, 249. So if property is mortgaged to secure a bond, the mortgage is defeated by the defeat of the bond. Thorndike *v.* Stone, 11 Pick. 183; Bray *v.* Bates, 9 Met. 237.

(*t*) The Schooner Zephyr, 3 Mason, 341. A bottomry bond was given, payable five days after the arrival of the ship in Boston. A bill of exchange for the amount loaned was drawn on London. The bottomry bond was to be void in case the bill was paid, the bottomry bond should be void at the option of the borrower. The borrower did not pay the bills of exchange, and the question was whether the holder of the bottomry bond could recover the exchange between London and Boston, in a suit on the instrument.

SECTION III

OF THE DISCHARGE OF STATUTORY AND MECHANICS' LIENS BY BILL OR NOTE.

Closely allied with equitable liens and the liens of the admiralty courts are the liens which are created by the various State statutes in favor of mechanics. These liens give the mechanic the same claim on the building in the construction of which his labor or materials are employed as the general maritime law gives the material-man on the foreign ship to which he has furnished supplies or repairs.(*u*) Moreover, the various States have passed statutes (*v*) in favor of material-men employed upon domestic ships, which can be enforced in the State courts, and have been sometimes enforced by the admiralty courts of the United States.(*w*)

In their nature, as we have implied above, these statutory liens are like *privilegia* in the civil law, and are nowise dependent on possession. Like equitable liens, they attach to real estate, and their means of enforcement are provided by the statutes creating them, which also provide that they shall be of no effect if not enforced within a certain time.(*x*) In this they bear some resemblance to maritime liens, which by neglect to enforce them are lost to their holder.(*y*) After a vessel to which a maritime lien has attached has performed several voyages, even the sailors' lien for wages and the lien of the holders of bottomry bonds are lost by their neglect, and will not be enforced in a court of ad-

(*u*) The General Smith, 4 Wheat. 438.

(*v*) See 1 Parsons, Mar. Law, 493, note 1, for a collection of the statutes.

(*w*) 1 Parsons, Mar. Law, 501, note 2; The General Smith, 4 Wheat. 438, note *a*.

(*x*) Wheeler *v.* Schroeder, 4 R. I. 383. The action to be commenced within four months. Robinson *v.* Marney, 5 Blackf. 329, 2 R. S., N. Y. 405, § 1; Steamboat Joseph E. Coffee, Olcott, Adm. 401. In the latter case, it is provided that the lien shall cease directly the ship or vessel leaves the State; but the lien was held not to be diverted by the boat's going from New York to New Jersey, during the progress of the repairs.

(*y*) Leland *v.* The Ship Medora, 2 Woodb. & M. 92. Permitting the vessel to depart was held to defeat the lien. The maritime law requires liens to be enforced as early as possible after they attach, for in this way only the rights of innocent third parties can be protected. Peyroux *v.* Howard, 7 Pet. 324, 345. See Packard *v.* Louisa, 2 Woodb. & M. 48; The Nestor, 1 Sumner, 73, 80; The Chusan, 2 Story, 455

miralty, unless it is made to appear that the sailors or holders are in no actual default.

These statutory liens are not in general waived or defeated by the receipt of negotiable paper in payment thereof,(*z*) unless in cases where there is clear proof of an intention to abandon the lien. And when negotiable paper is not payment or discharge of a prior debt, but the negotiation of such paper would raise the presumption of payment, this is rebutted by the fact that by such presumption such a lien is lost.(*a*)

(*z*) Greene *v.* Ely, 2 Greene, Iowa, 508. "The lien is purely statutory, and the manner of enforcing it clearly defined." The court hint at a different doctrine, but think that the lien is not waived. "Why should not a mechanic be as much entitled to his lien after taking a note, as a vender (of land) after receiving an obligation for the purchase-money?" In Mix *v.* Ely, 2 Greene, Iowa, 513, the note given fell due about six months after it was given. The second section of the act giving the lien provides that, "When any person shall wish to avail himself of the benefit of such lien, he shall commence his action, in any court having jurisdiction of the same, within one year from the time it should have been made by virtue of such contract by which such lien shall be claimed." The payment of the note on the contract which created the lien should have been made on the first of May, 1848. It was only necessary, then, to commence suit within one year from that time. By taking a note, then, the time of lien provided by statute is actually extended. *Quære*, whether renewing a note would still further extend the time of lien. It was held in Wheeler *v.* Schroeder, 4 R. I. 383, in the case of a written contract "payable in satisfactory paper at six months," that the four months within which the process was to be commenced under the statute begin to run from the maturity of the paper, and not from the completion of the job. In Goble *v.* Gale, 7 Blackf. 218, the mechanic's lien was not defeated, though he gave a receipt in full. Accepting a bond and warrant of attorney was no defeat of lien. Thompson's Case, 2 Browne, 297, and Hinchman *v.* Lybrand, 14 S. & R. 32, regard a lien by statute as much stronger than the vendor's lien on land, and imply that the mechanic's lien might not be waived by taking a bond, as a vendor's was in Kauffelt *v.* Bower, 7 S. & R. 64; Kinsley *v.* Buchanan, 5 Watts, 118, *per Curiam:* "Additional securities are in their nature cumulative; nor where the parties have not expressly or impliedly so stipulated is there any reason why the one should be a relinquishment of the other." In Sutton *v.* The Albatross, 2 Wallace, Jr. 327, a receipt in full was given. In the Steamboat Charlotte *v.* Hammond, 9 Misso. 58, a note given to fall due during the time allowed for the existence of the lien, was held no extinguishment of the lien. The case of Dutton *v.* N. E. Mut. Fire Ins. Co., 9 Foster, 153, is one in which taking a note of one partner discharged a lien which might attach to their buildings. The circumstances under which the note operated as a discharge appear in the case. In The Active, Olcott, Adm. 286, the view seems to be that, the lien being given to secure the debt, that only defeats the lien which would defeat the debt.

(*a*) Sweet *v* James, 2 R. I. 270. A negotiable note is not payment of a pre-existing debt, but the actual negotiation raises such a presumption; but this is only *prima facie*, and is rebutted by the fact that, if the note be considered payment, a lien is thereby lost. This was a case of mechanic's lien, and is an excellent case on the subject. From *dicta* in Curtis *v.* Hubbard, 9 Met. 322, and Melledge *v.* Boston Iron Co., 5

Moreover, as in the case of payment of a prior debt by negotiable paper, a receipt in full is not absolute evidence of an abandonment, but may be contradicted.(*b*)

In many of the States a judgment gives a lien on property, which is plainly in nature a *privilegium*, and is dependent on the statute creating it for its means of enforcement.

A judgment lien may be defeated by taking a note or bill in payment and satisfaction; but we should say that the waiver and surrender of the lien would not be readily presumed, and not unless such appeared to be the intention of the parties.(*c*)

SECTION IV.

OF THE LOSS OF THE RIGHT OF STOPPAGE IN TRANSITU BY RECEIPT OF BILL OR NOTE.

THE right of stoppage *in transitu* is also unaffected by the seller receiving a bill of exchange, even if it be indorsed over, unless it be clearly regarded as payment.(*d*) For stoppage *in*

Cush. 158, the rule with regard to rebutting the presumption would seem to be nearly the same in Massachusetts. In Maine, however, — in Coburn *v.* Kerswell, 35 Maine, 126, — the opposite doctrine would seem to be strongly implied, and we should judge the same rule of law would obtain in Vermont. In the case of Hutchins *v.* Olcutt, 4 Vt. 549, giving a note on demand was held to defeat a possessory lien, and from this we suppose the presumption of payment in the case of a statutory lien must be equally strong. See Hubbard *v.* Page, Sprague, 335, per Mr. Justice *Sprague*.

(*b*) See cases *supra;* and Sutton *v.* The Albatross, 2 Wallace, Jr. 327.

(*c*) But that it may be the case that a note is an extinguishment of the judgment there is no doubt. Like all other questions of payment by bill or note, it depends entirely upon the intention of the parties. Brewer *v.* The Branch Bank, 24 Ala. 439; Dogan *v.* Ashbey, 1 Rich. 36. In the latter case, the owner of two judgments against A, and one against A and B, accepted the joint note of A and B for the full amount of the three judgments, and gave receipts, as for so much money, in full of debt and interest; held that the judgments were satisfied. In this case the receipt in full was allowed to have some weight, and to stand as showing payment and satisfaction, so long as it was uncontradicted by other evidence.

(*d*) Feise *v.* Wray, 3 East, 93. A trader here gives an order to his correspondent to send him goods, which are procured on the credit of the correspondent, without the trader's name being known to the vendee. The correspondent was held to be so far a vendor, as between him and the trader here, that, on the bankruptcy of the latter, he may stop the goods *in transitu* by procuring a bill of lading from the bankrupt's brother; and this, though the trader here before his bankruptcy had accepted bills of exchange drawn on him by his correspondent for the amount of the goods; such acceptances,

transitu is merely an extension of the vendor's lien,(*e*) and the receipt of bills of exchange, or of part payment,(*f*) would not defeat such a lien, except upon the agreement of the parties, or upon waiver of the lien by actual delivery to the vendee. The insolvency of the consignee, which gives the right of stoppage *in transitu*, renders the bills like so much waste paper, and the vendor, because his possession is not completely divested, may enforce his lien.

Thus, if a merchant in Liverpool consign goods to one in New York, and draw bills which are accepted, and sends the goods in a vessel pointed out by the consignee, this is an executed sale and a constructive delivery, so far that the goods are at the risk of the consignee.(*g*) But it is not an actual delivery; and the consignor may send a bill of lading indorsed by him to his agent in New York, with orders to take the goods immediately on their arrival, and hold them until the bills of exchange are paid or secured. And it has been said that the bill need not be tendered back by the consignor upon such stoppage.(*h*)

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provable under his commission, amounting at most to a part payment for the goods, which does not take away the vendor's right of stoppage *in transitu*. Owenson *v.* Morse, 7 T. R. 64. In Snee *v.* Prescot, 1 Atk. 245, Lord *Hardwick* said, that if a consignor should get back his goods in any way short of felony, he should not blame him. In Hodgson *v.* Loy, 7 T. R. 440, it was held that part payment did not defeat the right of stoppage *in transitu*, but only diminished the vendor's lien *pro tanto*. Jenkyns *v.* Usborne, 7 Man. & G. 678; Bell *v.* Moss, 5 Whart. 189. See Newhall *v.* Vargas, 13 Maine, 93, for a very full view of authorities. Donath *v.* Broomhead, 7 Penn. State, 301. In Miles *v.* Gorton, 2 Cromp. & M. 504, the goods in the warehouse of the vendor were sold under an invoice which expressed that they were to remain for rent. A bill of exchange was given for the price and negotiated, but before maturity the vendee became bankrupt. Held, that the vendor had not lost his lien. The court said: "Here, in point of fact, the warehouse rent was not actually paid, but only charged, and such charge amounted to a notification by the seller to the purchaser that he was not to have the goods, not only until payment of the price, but of the rent; and I think the effect is not to make, as has been argued, the warehouse of the vendor the warehouse of the vendee, but to make it a part of the contract between the parties, that the goods are not to be delivered until not only the price, but the rent, is paid." Ilsley *v.* Stubbs, 9 Mass. 65; Abbott on Ship., ch. 8; Mason *v.* Lickbarrow, 1 H. Bl. 357; Fearon *v.* Bowers, id. 365, note *a*.

(*e*) 1 Parsons, Mar. Law, 340, note 2.

(*f*) See *supra* as to the receipt of bills, p. 177, note *d*. As to part payment, see Hodgson *v.* Loy, 7 T. R. 440; Feise *v.* Wray, 3 East, 93; Newhall *v.* Vargas, 13 Maine, 93; Kymer *v.* Suwercropp, 1 Camp. 109.

(*g*) Stanton *v.* Eager, 16 Pick. 467.

(*h*) Edwards *v.* Brewer, 2 M. & W. 375. In Hays *v.* Mouille, 14 Penn. State, 48,

And even if it be proved before commissioners of insolvency, the dividend received on it will only be considered as so much paid towards the price of the goods, and this although the bill is not yet mature.

SECTION V.

OF PAYMENT BY THE BILL OR NOTE OF ONE PART OWNER.

By the maritime law, part owners are generally liable *in solido* for repairs and supplies to the vessel; (*i*) and where they are so, the taking of a bill or note from one will discharge the others only when it can be shown that this was intended, or that credit was given to one or more of the part owners exclusively.(*j*) And even then, upon the general principles of the law of contract, the creditor does not lose his claim against the others, if he gave the credit to the rest exclusively, in ignorance that there were other owners to whom he might look for payment.(*k*)

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it was held directly that "The purchaser's notes given for the price of the goods need not be tendered back before *stopping* the goods *in transitu*."

(*i*) 1 Parsons, Mar. Law, 89, note 1, and cases. In Louisiana, it is held that part owners are not liable *in solido*, unless they form a partnership. Carroll *v.* Waters, 9 Mart. La. 500; Kimbal *v.* Blanc, 20 id. 386; David *v.* Eloi, 4 La. 106, 108; Burke *v.* Clarke, 11 id. 206.

(*j*) See 1 Parsons, Mar. Law, 91, note 1. The following are cases in which payment has been made by the negotiable paper of one of the part owners, and the other part owners still held liable. Higgins *v.* Packard, 2 Hall, 547; Muldon *v.* Whitlock, 1 Cowen, 290; Schemerhorn *v.* Loines, 7 Johns. 311; King *v.* Lowry, 20 Barb. 532; Patterson *v.* Chalmers, 7 B. Mon. 595; Cheever *v.* Smith, 15 Johns. 276; Wyatt *v.* Marquis of Hertford, 3 East, 147. See Reed *v.* White, 5 Esp. 122; Arnold *v.* Camp, 12 Johns. 409; Robinson *v.* Read, 9 B. & C. 449; Johnson *v.* Cleaves, 15 N. H. 332; 1 Parsons, Mar. Law, p. 91, note 3. If one part owner by giving his note has been able, by means of receipts or other evidence of settlement furnished him by the creditor, to settle with his co-owners, the note will be held a payment or discharge of the owners. The waiver is to be settled on all the evidence. The ship's husband binds the principals while acting within the scope of his authority. Creditors may waive the owner's liability and trust to the ship's husband alone, and may be estopped from denying this if he has dealt with the agent in such a way as to justify the other owners in believing that the agent's personal credit was relied on, and has permitted them to settle their accounts with the ship's husband on that basis, — in such a way as to be damnified if still held responsible. See Thompson *v.* Finden, 4 Car. & P. 158; Muldon *v.* Whitlock, 1 Cowen, 290; Wyatt *v.* Hertford, 3 East, 147; Cheever *v.* Smith, 15 Johns. 276; Reed *v.* White, 5 Esp. 122.

(*k*) Thomson *v.* Davenport, 9 B & C. 78; Schemerhorn *v.* Loines, 7 Johns. 311

Charging one owner would only raise a presumption which might be defeated by showing that only one was known; and for the same reason, if payment be made in such a case by the negotiable paper of one, which is dishonored, the others are liable.

It must be certain that it was not only intended to charge one, but to discharge the rest.(*l*) In Maine and Massachusetts, in the common-law courts, negotiable paper would be presumed to be absolute payment; but we think it would be otherwise in admiralty courts, even within those districts.(*m*)

Whether one part owner can bind the other owners by his bills, even for repairs, seems to be doubtful.(*n*)

SECTION VI.

OF PAYMENT BY BILLS OF STRANGERS.

A DEBTOR may pay a debt, or a purchaser pay for his goods, by the transfer of the bills of other parties; and the like payment by the parties' own note or bill will, by the prevailing rule of law, be payment or not, according to the intent or bargain of the parties.(*o*) But another question may arise, and that is, What liability is left upon the transferrer if the paper is dishonored? It would seem that bills of a third party would more readily be presumed payment than the bills of the party himself; for, as we have seen, the later New York cases tend to a rule that no

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(*l*) See cases in note *j*, *supra*, p. 179.

(*m*) See Wallace *v.* Agry, 4 Mason, 336; The Bark Chusan, 2 Story, 455; The Brig Nestor, 1 Sumner, 73; Leland *v.* The Medora, 2 Woodb. & M. 92; Macy *v.* De Wolf, 3 id. 193; The Eastern Star, Ware, 184; Page *v.* Hubbard, Sprague, 335. See these cases *supra*. In Baker *v.* Draper, U. S. C. C., Mass., Boston Courier, Dec. 1, 1860, Mr. Justice *Clifford* held that the rule, as laid down by the State courts, must prevail in the Admiralty; that the presumption was one of fact, and not of law, and that it might be controlled by any circumstances which show that it was not the intention of the parties to the contract that it should operate as payment.

(*n*) See 1 Parsons, Mar. Law, 87, note 1. In Dickinson *v.* Valpy, 10 B. & C. 128, the Attorney-General (Scarlett) said, *arguendo*: "Ship-owners may bind each other for repairs, but not by bills of exchange." He cites Williams *v.* Thomas, 6 Esp. 18, which does not decide the point, nor does it contain a *dictum* to that effect. See also Brodie *v.* Howard, 17 C. B. 109.

(*o*) See Sect. I. of this chapter, and notes

intent of the parties can make the latter equivalent to payment. while in the former case this intent may be shown.(*p*)

The transferrer either indorsed the bill or gave with it his guaranty, or transferred it merely by delivery. Of the law of indorsement and guaranty we have already spoken, and say now only, that if the paper be forged or be otherwise wholly void in the hands of the transferrer, he will nevertheless be liable as indorser or guarantor, and may be considered as making new paper by his own signature; or as giving by his transfer and indorsement a warranty of his own title as well as of the validity of the former signatures.(*q*) To consider each signature in indorsement as creating a new promise seems to explain much of the law of negotiable paper.

If the paper be transferred only by delivery, the question is a little more difficult. In the first place, where paper is indorsed to a creditor, the debt cannot be sued without proof of presentment and notice of dishonor of the bill or note.(*r*)

(*p*) See Sect. I. of this chapter, p. 159, note *t*.

(*q*) Dana *v.* Angel, 1 Hawaian, 180; Strange *v.* Ellison, 2 Bailey, 385. If the holder of a promissory note sell or barter it, with the name of a third person indorsed, there is an implied warranty on his part that the indorsement is genuine, unless it appears that the transferee took it without reference to that security, or had agreed to run the risk of the indorsement being genuine. So if a note be not indorsed, there is still a warranty that the signatures are genuine. Camidge *v.* Allenby, 6 B. & C. 373.

(*r*) Bridges *v.* Berry, 3 Taunt. 130. The defendant being unable to pay a bill when due which he had accepted, obtained time, and indorsed to the plaintiff, as security, a bill drawn by himself to his own order, which when due was dishonored by the drawee, but the holder omitted to give the defendant notice. Held, that by this laches the defendant was discharged as indorser, also as acceptor of the other bill. Kearslake *v.* Morgan, 5 T. R. 513. Gallagher *v.* Roberts, 2 Wash. C. C. 191, seems to conflict with this rule, requiring presentment and notice to the debtor who indorses the bill in payment of a preceding debt. But it was decided a century ago, that the drawer of a bill of exchange stood in the same relation to the payee as did the indorser of a promissory note. Heylyn *v.* Adamson, 2 Burr. 669, 677, per Lord *Mansfield*. It would seem also to be clear that, if the note of a third party were indorsed by the debtor in payment of a precedent debt, the debtor can only be held liable to the creditor as indorser of such note, in which case, of course, strict rules of demand and notice will be required. Fulford *v.* Johnson, 15 Ala. 385; Farr *v.* Stevens, 26 Vt. 299. If, then, a bill or note be sold by the maker, he is entitled as the indorser thereof to a strict application of the law with regard to demand and notice; but, according to the case above cited, if given in payment of a prior debt, the rules are relaxed. We should suppose this case might be doubted, or at least limited in its application to the circumstances before the court, which show the bill to have been taken conditionally. In M'Lughan *v.* Bovard, 4 Watts, 308, Mr. Justice *Gibson* makes a remark which would seem to support the case of Gallagher *v.* Roberts: "A note or bill taken in satisfaction of a

But when it is not indorsed, the creditor, in suing on his original debt, need only show that the bill still remains in his

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precedent debt imposes no further duty on the creditor than to use reasonable diligence in obtaining payment or acceptance by presenting it in season, and giving notice of its dishonor to the debtor from whom it was had, if he be a party to it. Smith *v.* Wilson, Andr. 187. But where, as here, the debtor is not a party to it, even want of notice is immaterial, unless he has sustained actual loss from it. Chitty on Bills, 98." If the note be taken in *discharge* and *satisfaction*, the debtor, if indorser, seems to be entitled to the rights of indorser. If his name be not on the note, he is no party to it, and the creditor is paid, so far as the debtor is concerned, by the bill or note of the third person. It cannot be that Mr. Justice Gibson means that the note is taken in actual satisfaction of the precedent debt, for the authority cited merely decides that a note taken for a precedent debt is taken as payment, on condition that it is paid in the proper time. Smith *v.* Wilson, Andr. 187. See the remarks of *Bayley*, J., in Camidge *v.* Allenby, 6 B. & C. 373; Soffe *v.* Gallagher, 3 E. D. Smith, 507. In Francia *v.* Del Banco, 2 Duer, 133, goods were sold for approved paper, and the defendants indorsed to the plaintiffs an accepted bill of exchange. *Duer*, J. said: "But all the authorities agree that, where such a note or bill, by the understanding and agreement of the parties, is transferred and received in payment of the debt, the prior liability of the debtor is extinguished, and it is only as an indorser that he can then be charged." When a drawer of a bill of exchange has no funds in the hands of a drawee, he is not entitled to notice, for the notice to the drawer is to enable him to withdraw his funds from the drawee's hands, and this is needless when he has no funds to withdraw. *Cessante ratione cessat lex.* And upon the dishonor of a bill before due, the creditor may resort to the original consideration. Tempest *v.* Ord, 1 Madd. 89. In Farr *v.* Stevens, 26 Vt. 299, it was held that, where the vendee had indorsed a note at the time of sale, it was a payment, and the vendee could only be treated as an indorser. So in Jennison *v.* Parker, 7 Mich. 355, it is held that, when a draft was received indorsed by the debtor as collateral security for what the defendants were owing the plaintiff, to be applied when paid, and not before, it was his duty to present the same for payment when it became due, and take the proper steps to charge the debtor as indorser; and failing to do this, he makes the paper his own. Dayton *v.* Trull, 23 Wend. 345, seems to settle the question; but *Bronson*, J. distinguishes, on the authority of Jones *v.* Savage, 6 Wend. 658, a bill from a note; for a drawer is supposed to provide for a bill by placing funds in the drawee's hands. Lawrence *v.* Langley, 14 N. H. 70, takes no such distinction. It was a case of a promissory note indorsed by the defendant, "as security for the payment of the balance of a debt." It was held that the notice of demand and non-payment must be made in the regular way to charge the debtor as indorser. Tobey *v.* Barber, 5 Johns. 68, and note to Sect. I. on Laches. In Kearslake *v.* Morgan, 5 T. R. 513, the plea was, that a note was indorsed *for and on account of their debt*; on demurrer, objecting that it was not alleged that it was in satisfaction, or that there had been laches. Plea held good. This is approved by Chitty, Bills, 97; and due diligence must be shown on the part of the plaintiff. Dayton *v.* Trull, 23 Wend. 345. In Jones *v.* Savage, 6 Wend. 658: No recovery is allowed on goods, unless the drawer of a bill of exchange given for them has been legally fixed. See Whitney *v.* Abbot, 5 N. H. 378, for what may be a waiver of want of proper presentment and regular notice. See Covely *v.* Fox, 11 Penn. State, 171. *Semble contra*, Kelsey *v.* Rosborough, 2 Rich. 241; also Price *v.* Price, 16 M. & W. 232; Hebden *v.* Hartsink, 4 Esp. 46.

hands.(*s*) This is presumptive evidence of dishonor, and the defendant must then show that the note has been paid. As to paper transferred by delivery, the general rule we have elsewhere shown is, that the transferrer is not liable on such notes.(*t*) When the paper was transferred without indorsement, in payment of any simultaneous debt or purchase, or for any new consideration,(*u*) it constitutes generally payment of the debt, and the mere dishonor of the paper does not revive the original debt or consideration, or in any way give the transferee a remedy against the transferrer. The transaction amounts to a sale of such bill or note.

This rule rests upon the ground that, when a note is sold and then transferred by delivery, the purchaser takes all the risk of the solvency of the parties who ought to pay it. And that a transfer for a new purchase, or other new consideration, is in its effect a sale, and there is no guaranty implied as to the solvency of the maker or any other party. The rule, therefore, applies only when the transfer can be considered as a sale. Hence it

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(*s*) Goodwin *v.* Coates, 1 Moody & R. 221. Where the buyer of goods hands over to the seller the promissory note of a third party, without indorsing it; held, that in an action for the price of the goods, the plaintiff need not prove presentment of the note to the maker. See Robson *v.* Oliver, 10 Q. B. 704. *Denman*, C. J. said: "If A gives B a promissory note made by another person (not his own, as in Price *v.* Price, 16 M. & W. 232), payable either on demand or at a future day, and the note is taken in account, B must present it in a reasonable time, just as if it had been indorsed to him." It was determined in this case that the acceptors being bankrupt at the time the notes were taken was an excuse for non-presentment. But the principle, that in the case of persons not parties to the paper there need be no presentment in case of insolvency of the maker, is recognized in the cases *infra*, which are, however, generally cases which turned on other points, and in which the negotiable paper was a bank-note. Camidge *v.* Allenby, 6 B. & C. 373; Robson *v.* Oliver, 10 Q. B. 704; Turner *v.* Stones, 1 Dow. & L. 122; Rogers *v.* Langford, 1 Cromp. & M. 637. *Bayley*, B. says: "The notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them, or of making the best of them." This is criticised with much acuteness by Mr. Justice *Coleridge*, in Turner *v.* Stones, 1 Dow. & L 122. See *supra*, Bank-Notes. Henderson *v.* Appleton, cited in Rogers *v.* Langford, 1 Cromp. & M. 642, and from Chitty on Bills, Addenda, p. 658, 7th ed. Van Wart *v.* Smith, 1 Wend. 219, fully supports the text. For other cases arising from the dealings between the same parties, see Van Wart *v.* Woolley, 3 B. & C. 439, Ryan & M. 4.

(*t*) Refusal to indorse is strong evidence that the risk is on the transferee. Whitbeck *v.* Van Ness, 11 Johns. 409; Breed *v.* Cook, 15 id. 241; St. John *v.* Purdy, 1 Sandf. 9. See also notes to § 1 in general.

(*u*) Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391; Ward *v.* Evans, 2 Ld Raym. 928.

has been said to be extremely clear, that, if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the law of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill.(*v*)

But if paper be transferred by delivery only as a security for a pre-existing debt, and it is dishonored while in the transferee's hands, it affects in no way the debt it was intended to secure.(*w*) The original liability remains what it was, and upon dishonor of the paper it is not even necessary to give him notice thereof as an indorser. The authorities are somewhat confused on this point, but the rule of law is, undoubtedly, that the debtor is not entitled to any technical notice, but may show in defence any injury he has sustained by the actual laches of the creditor. If a creditor is referred to a third person for payment, and such person gives him the option of receiving cash or a bill, when the latter is taken it operates as a discharge of the original debtor, though the bill received be dishonored at maturity.(*x*) But when a bill of a third person is taken from the debtor himself, a different question is presented. It was said long ago that "taking a note for goods sold is a payment, because it is a part of the original contract; but paper is no payment when there is a precedent debt. For when such a note is given in payment, it is always taken under this condition, to be payment if the money be paid thereon in convenient time."(*y*) But this now requires some modification with regard to paper transferred in payment

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(*v*) Stedman *v.* Gooch, 1 Esp. 3. See Kearslake *v.* Morgan, 5 T. R. 513; Okie *v.* Spencer, 2 Whart. 253; Fenn *v.* Harrison, 3 T. R. 757; Evans *v.* Whyle, 5 Bing. 485, 3 M. & P. 130; Ex parte Shuttleworth, 3 Ves. 368; Fydell *v.* Clark, 1 Esp. 447; Bank of England *v.* Newman, 1 Ld. Raym. 442, 12 Mod. 241; Emly *v.* Lye, 15 East, 7, 12. In Ex parte Blackburne, 10 Ves. 204, the Chancellor seemed to think that, if goods are purchased and paid for with bills unindorsed, and they turn out bad, the vendee is still liable. Jones *v.* Ryde, 5 Taunt. 488, 1 Marsh. 157; Owenson *v.* Morse, 7 T. R. 64; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391; Robson *v.* Oliver, 10 Q. B. 704; Ward *v.* Evans, 2 Ld. Raym. 928; Rogers *v.* Langford, 1 Cromp. & M. 637; Weakly *v.* Bell, 9 Watts, 273, *contra*.

(*w*) Marsh *v.* Pedder, 4 Camp. 257, Holt, N. P. 72; Ex parte Dickson, cited 6 T. R. 142; Taylor *v.* Briggs, Moody & M. 28; Robinson *v.* Read, 9 B. & C. 449.

(*x*) Strong *v.* Hart, 6 B. & C. 160, 9 Dow. & R. 189, 2 C. & P. 55; Smith *v.* Ferrand, 7 B. & C. 19, 9 Dow. & R. 803; Baillie *v.* Moore, 8 Q. B. 489.

(*y*) Ward *v.* Evans, 2 Ld. Raym. 928. See Camidge *v.* Allenby, 6 B. & C. 373; Moore *v.* Warren, 1 Stra. 415; Holme *v.* Barry, id. 415.

of an old debt. It would seem that a transfer, even without indorsement, would not place the solvency of the payor entirely at the risk of the transferee. We see there is authority for saying that the original debt revives,(z) in cases where the revival can cause no injury to the transferrer, because he would have lost the money equally if he had kept the note himself. The creditor was entitled to cash; taking notes instead is a favor to the debtor, and he is entitled, it is said, to the money, if the notes are not paid.

But there can now, we think, be no rule in such cases which would control the bargain of the parties.(a) If it could fairly be inferred from any circumstances that their intention was to close and consummate the transaction without leaving any liability behind it, — that is, if it could be shown that the creditor discharged the debt in consideration of the paper, taking upon himself the risk of its payment, — then he would certainly be held to his bargain, always supposing an entire absence of fraud on the part of the transferrer. If an express contract to this effect were proved, we know no reason why it should not be regarded. And we see as little reason for saying that such a contract may not be proved by the indirect evidence of circumstances. For there are many circumstances from which a jury can infer whether it was a discharge or not. And accordingly it has been distinctly asserted by high authority, that the nature of the transaction, and all the circumstances regarding the bill, must be inquired into, in order to ascertain whether he is subject to any liability.(b) If the bill be delivered and received as an

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(z) In Evans *v.* Whyle, 5 Bing. 485, 3 Moore & P. 130, *Park*, J. said: "The distinction is to be collected from the cases which have been cited. If a party sells goods, and takes for them a bill of exchange which is not honored, he is remitted to his original consideration; but if he discount bills for money to one who does not even indorse them, it is a purchase of the bills at his own risk." See Emly *v.* Lye, 15 East, 7, 12. Where another security is not required, the party who discounts a bill of exchange stands in the situation of a purchaser of the bill, and therefore, according to the case of Bank of England *v.* Newman, 1 Ld. Raym. 442, 1 Comyns, 57, cannot recover, against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount. Ex parte Blackburne, 10 Ves. 204, in which a bill taken for a prior debt turned out to be bad, and it was held that the original consideration might be resorted to. But if the bill be discounted, and there is no antecedent debt, it is evidence of a purchase, and there is no demand.

(a) See notes in Sect. I. Ex parte Isbvester, 1 Rose, 20.

(b) In Jones *v.* Ryde, 1 Marsh. 157, 5 Taunt. 488, it was decided, that one who dis-

absolute payment and discharge, he will not be liable; if otherwise, he may. The mere fact of receiving such a bill does not show that it was received in discharge.(*c*) But the rule probably is, that when payment and discharge cannot be shown, the risk of the payment of a note so given and received remains with the transferrer.

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counts a forged navy bill for an innocent person may recover from his transferrer the money given as so much had and received to his use. Chief Justice Gibbs lays down this principle, that the negotiator of the bill by declining to indorse it is not relieved from that responsibility which attaches to him for putting off an instrument of a certain description, which turns out not to be as he represents it. Fuller *v.* Smith, Ryan & M. 49. In this case *Abbott*, C. J. said: "If you take a bill without an indorsement, you cannot sue a person from whom you receive it, but then you take it as a bill; but here, in fact, the instrument on the faith of which the money was advanced, turns out not to be a bill of exchange, as it was represented, being altogether a forgery, and that I conceive to be the distinction." Young *v.* Adams, 6 Mass. 182. In Ellis *v.* Wild, id. 321, the circumstances were very strong. The one party agreed to sell goods to the other, and that certain notes should be taken for them; these turn out to be forged. It was held that he could not resort to the original debtor. It would be otherwise if the bargain were for cash. This case may be doubted as an authority; even upon a bargain for certain notes, if one proves false, recovery may be had. Markle *v.* Hatfield, 2 Johns. 455. M. sold goods to H., and received payment in bank-notes which were paid to C., who discovered one of the notes to be forged. Neither M. nor H. knew the note was bad. It was held that the forged note was no payment, and could be treated as a nullity, and resort had to the original consideration. Eagle Bank *v.* Smith, 5 Conn. 71. "A forged note or dishonored draft, if delivered in payment, is no satisfaction or extinguishment of an antecedent demand, and for most just and obvious reasons. They are of no value, and not what they were, either expressly or impliedly, affirmed to be by the person delivering them as payment, or believed to be by him who accepted them as such. On this point the law is too well established to require the aid of argument." Puckford *v.* Maxwell, 6 T. R. 52; Owenson *v.* Morse, 7 id. 64; Stedman *v.* Gooch, 1 Esp. 3; Roget *v.* Merritt, 2 Caines, 117; Smith *v.* Smith, 2 Johns. 235; Arnold *v.* Crane, 8 id. 79; Mudd *v.* Reeves, 2 Harris & J. 368; Hargrave *v.* Dusenberry, 2 Hawks, 326; Keene *v.* Thompson, 4 Gill & J. 463; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 33, 630, note; U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333; Cabot Bank *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258.

(*c*) Payment must be generally understood in the cases to mean conditional payment, and not absolute payment and satisfaction. This is important to a correct understanding of some of the cases, and many of the *dicta*. In Stedman *v.* Gooch, 1 Esp. 3, Lord *Kenyon* says "that if, in *payment* of a debt, the creditor is content to take a bill or note, payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable, or default is made in the payment." Here we see "payment" used to mean the conditional payment by the note, and the absolute payment of the note by coin. In Maillard *v.* Duke of Argyle, 6 Man. & G. 40, on special demurrer it was held that, even in pleading, "payable" might be considered conditional payment by note. *Tindal*, C. J. said: "Payment does not necessarily mean payment in satisfaction and discharge, but may be used in its popular sense." See Wheeler *v.* Schroeder, 4 R. I. 383, where "*payable* in promissory notes" was construed to mean "payment in case the notes were paid."

We think whoever gives negotiable paper, transferable by delivery, warrants that the signatures are genuine; and Mr. Justice Story, in his work on Promissory Notes,(*d*) lays it down that there is a warranty of title. But why should this be so when an honest transferee need give no such warranty? (*e*) For, as we have seen, property follows possession, and the mere possession of the transferrer is enough to give a perfect title to the honest taker of the paper negotiable by delivery only.(*f*) We hold that the doctrine of implied warranty in sales is applicable to the sale of bills and notes only to the extent that one who sells indorsed notes warrants the indorsement genuine.

SECTION VII.

OF PAYMENT BY BANK-BILLS.

Much of the law stated in the previous sections applies to the transfer of bank-bills, for they are promissory notes of the bank, either payable to bearer or indorsed by a payee in blank, and in either case transferable by delivery; and they should be governed by the same rules, unless so far as they must be considered constituting an exception to the general law governing negotiable paper of similar character.(*g*) We have considered

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(*d*) Promissory Notes, § 118.

(*e*) Goodman *v.* Harvey, 4 A. & E. 870, 6 Nev. & M. 372. In an action by the indorsee of a bill, who has given value to a fraudulent indorser, the question for the jury is only whether he acted with good faith in taking the bill. Even gross negligence is not to be considered by the jury. "Gross negligence," said Lord *Denman*, "may be evidence of *mala fides*, but is not the same thing. . . . . Where the bill passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." Willis *v.* Bank of England, 4 A. & E. 21; Uther *v.* Rich, 10 A. & E. 784, 2 Per. & D. 579. See Backhouse *v.* Harrison, 3 Nev. & M. 188, 5 B. & Ad. 1098; Crook *v.* Jadis, id. 909, 3 N. & M. 257; Foster *v.* Pearson, 1 Cromp. M. & R. 849, 5 Tyrw. 255; Young *v.* Cole, 3 Bing. N. C. 724; Gompertz *v.* Bartlett, 2 Ellis & B. 849, 24 Eng. L. & Eq. 156; Gurney *v.* Womersley, 28 id. 256; Dana *v.* Angel, 1 Hawaian, 180.

(*f*) Strange *v.* Ellison, 2 Bailey, 385; Cabot Bank *v.* Morton, 4 Gray, 156; Aldrich *v.* Jackson, 5 R. I. 218.

(*g*) Scruggs *v.* Gass, 8 Yerg. 175. The court hold it difficult to distinguish between private notes and the notes of banks. See Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235; Turner *v.* Stones, 1 Dow. & L. 131.

in a chapter by itself the peculiar principles or rules of the law of bank notes or bills.

In England, Bank of England notes are by statute (*h*) legal tender for all sums above £ 5, except at the Bank of England or its branches; and so country bank-notes are a legal tender unless objected to, and are considered as cash. They are, however, everywhere considered by the law as money, more distinctly and unreservedly than other negotiable paper.(*i*)

(*h*) 3 & 4 Wm. IV. ch. 98, § 6.

(*i*) Solomons *v.* Bank of England, 13 East, 135, note; Southcot *v.* Watson, 3 Atk. 226, 232. Miller *v.* Race, 1 Burr. 452, per Lord *Mansfield*, is the most noted case on the subject of bank-notes. It was decided in 1758, and was an action of trover for a bank-note which had been stolen, but which the defendant had taken fairly and honestly in the way of business. The payment had been stopped at the bank, and when the plaintiff presented the bill for payment, the defendant, a clerk, refused to pay the note, or return it to the plaintiff. The case abounds in *dicta*, but the decision must have been the same had the note been an ordinary promissory note. Lord *Mansfield* said: "Now they (bank-notes) are *not* goods, not securities, nor documents for debts, nor are so esteemed; but are treated as *money*, as *cash*, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of *money* to ALL intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments *as* money or cash. . . . . A bank-note is constantly and universally, both at home and abroad, treated as *money*, as *cash*, and paid and received as *cash*; and it is necessary for the purposes of commerce that their *currency* should be *established* and *secured*." The words of Lord *Mansfield* are quoted and approved in the case of U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333; but this case was one which turned upon the point whether a bank was bound by receiving its own bills with forged signatures. Young *v.* Adams, 6 Mass. 182. See also cases in following notes. Phillips *v.* Blake, 1 Met. 156. The bank-notes were objected to, but finally taken; held, a good tender and payment. In Young *v.* Adams, it is said: "And it is to be remembered that bank-bills are, after all, only private contracts, having no public sanction similar to that which gives operation to the lawful money of the country. It seems, however, necessary, to go thus far in conformity to the usages unfortunately prevailing respecting bank-bills in their loose and unrestricted currency, dangerous as it is to the welfare of individuals and of the community." Bank-notes pass as cash by devise, — Stuart *v.* Bute, 11 Ves. 657, 662; Popham *v.* Aylesbury, Ambl. 68, — and not by devise of choses in action. Fleming *v.* Brook, 1 Sch. & L. 318; Drury *v.* Smith, 1 P. Wms. 404, held a bill good as a *donatio mortis causa*. So Miller *v.* Miller, 3 id. 356; Polglass *v.* Oliver, 2 Cromp. & J. 15. So possession is *prima facie* evidence of property. King *v.* Milsom, 2 Camp. 5; Greenstreet *v.* Carr, 1 id. 551. A tender of a country bank-note is a good tender, if the creditor only objects to the *quantum* and not to the quality of the tender. Lockyer *v.* Jones, Peake, N. P. 180, note. The last case was overruled in Mills *v.* Safford, and a Bristol bank-bill held not a good tender, though no objection was made on that account. This case will be found in Peake, N. P. 180, note. But *it* was overruled again in Tiley *v.* Courtier, 2 Cromp. & J. 16, note *c*, and Lockyer *v.* Jones established as law. Phillips *v.* Blake, 1 Met. 156; Handy *v.* Dobbin, 12 Johns. 220; Wright *v.* Reed, 3 T. R. 554; Guardians of Lichfield Union *v.* Greene, 1 H. & N.

If they are forged, the rule before stated as to other notes in relation to warranty of the signatures applies to them. In other words, forged bank-bills are nothing; payment by them is a nullity; their transfer effects nothing, and the transferee might recover money paid for them, or perhaps the value of anything given or sold for them, on the ground of entire absence or failure of consideration.(*j*)

884, per *Bramwell*, B. It (a bank-note) is not in all respects like a promissory note or bill of exchange, payable at a distant day. So *a fortiori*, Bank of England notes. Brown *v.* Saul, 4 Esp. 267; Grigby *v.* Oakes, 2 B & P. 526; Wright *v.* Reed, 3 T. R. 554. In America, the bank-notes more resemble the English country bank-notes than Bank of England notes; for the Bank of England notes are by statute made legal tender for £ 5 or upwards, except at the Bank of England or any of its branches. In the United States the States are forbidden by the Constitution to make anything except gold and silver a legal tender in the payment of debts. See Ex parte Board, 4 Cowen, 420; a sheriff was allowed to receive current bank-notes as money, and that against the creditor's express directions. Keith *v.* Jones, 9 Johns. 120. "The note is a negotiable note under the statute; and being declared to be payable in York State bills or specie is the same thing as being made payable in lawful current money of the State; for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding, regarded as cash." See also Judah *v.* Harris, 19 Johns. 144; Leiber *v.* Goodrich, 5 Cowen, 186; Dougherty *v.* Western Bank, 13 Ga. 287, 299; Bullard *v.* Bell, 1 Mason, 252; Phillips *v.* Blake, 1 Met. 156; Polglass *v.* Oliver, 2 Tyrw. 89. In Pickard *v.* Bankes, 13 East, 20, Lord *Ellenborough* said, Provincial bank-notes are certainly not money; but if the defendant receives them as such, they are money as to him. Lightbody *v.* Ontario Bank, 11 Wend. 9: "Although bank-notes supply the place of coin in affording a circulating medium, yet they are promissory notes, and in most respects the rules relating to promissory notes are applicable to them." Bills or notes payable in bank-bills are not negotiable. See definition of bill or note, Collins *v.* Lincoln, 11 Vt. 268. Bank-notes, though not money, have a certain legal character in some respects like money. Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235.

(*j*) Jones *v.* Ryde, 5 Taunt. 488; Wilkinson *v.* Johnson, 3 B. & C. 428; Young *v.* Adams, 6 Mass. 182; Phillips *v.* Ford, 9 Pick. 39; Mudd *v.* Reeves, 2 Harris & J. 368. This was a case of a forged bank-note, and both parties were equally innocent. It was held to be the loss of the *transferrer*. The value of a gelding for which it was given was recovered. Keene *v.* Thompson, 4 Gill & J. 463; Hargrave *v.* Dusenberry, 2 Hawks, 326. If one receive a counterfeit bank-note, he may treat it as a *nullity*. This was a case of a five-dollar bill altered to a fifty-dollar bill. Markle *v.* Hatfield, 2 Johns. 455; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 33; Simms *v.* Clark, 11 Ill. 137. Ramsdale *v.* Horton, 3 Penn. State, 330; see also note *k*, *infra*; Anderson *v.* Hawkins, 3 Hawks, 568; Pindall *v.* Northwestern Bank, 7 Leigh, 617; Wilson *v.* Alexander, 3 Scam. 392; Eagle Bank *v.* Smith, 5 Conn. 71; Thomas *v.* Todd, 6 Hill, 340. There are two authorities which trouble the courts in deciding questions with regard to counterfeit notes and bills, but which were decided with regard to counterfeit coin, and which are no doubt now bad law. Sheppard's Touch. 140, says, in discoursing of a mortgage, if payment be made, part of it in counterfeit coin, and the party accept it and put it up, this is a good payment, and consequently a good performance of the

It is therefore held, that if one passes counterfeit bills in payment of a debt, he is bound to receive them back, if he has notice that they are counterfeited within a reasonable time; and this reasonable time is a question for the jury, under the circumstances of the case.(*k*)

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condition. In Wade's Case, 5 Co. 114, we find this passage: "And it was said that it was adjudged between Vane and Studley, that where the lessor demanded rent of his lessee according to the condition of re-entry, and the lessee paid the rent to the lessor, and he received it and put it in his purse, and afterwards, looking again over it at the same time, he found among the money that he had received some counterfeit pieces, and thereupon he refused to carry away the money, but re-entered for the condition broken; and it was adjudged that the entry was not lawful, for when the lessor had accepted the money it was at his peril, and after that allowance he shall not take exception to any part of it." Both decisions were made to prevent forfeitures, which probably misled the courts. In the civil law, as quoted by Pothier, 1. 346, "The debtor is not only without any right of obliging the creditor to receive anything different from what is due as a payment, but even if the creditor by mistake receive some other thing upon the supposition of that being the thing which is actually due, the payment would not be valid, and the creditor may, on offering to return what he has so received, demand what is really due." This is also decided by Paulus, in 6. 50, *jj. si quum aurum tibi promississem, tibi ignoranti quasi aurum æs solverem non liberabor.* Dig. 46, 3. 50. Pothier, Traité des Obligations, No. 495.

(*k*) Gloucester Bank *v.* Salem Bank, 17 Mass. 33: "If it be said that the question whether there has been unreasonable delay and negligence is a question of fact for the jury, the answer is, that a judge, on the facts in this case, would be bound to instruct the jury that in point of law there had been negligence, so that a new trial would be altogether fruitless." This was a case in which one bank received its own bills forged, and kept them a long time without notice to the bank of which they were received. It was held that the bank was bound to know its own signature, and that laches had prevented a recovery. Thomas *v.* Todd, 6 Hill, 340; Ramsdale *v.* Horton, 3 Penn. State, 330; Markle *v.* Hatfield, 2 Johns. 455; Fogg *v.* Sawyer, 9 N. H. 365; Simms *v.* Clark, 11 Ill. 137. It is said: "The law undoubtedly is, that a party who innocently pays away a counterfeit bill is not bound to take it back unless it is returned upon him in a reasonable time after it is discovered to be spurious; and the reason of the rule is to enable him to trace out and fall back upon the person from whom he received it. But what shall be considered a reasonable time must necessarily depend on the situation of the parties, and the facts and circumstances of the particular case." In this case the notice of the spurious character of the bills was not shown to have been given for twenty days. The jury found the time reasonable, and the court would not disturb their verdict. The *discovery* of the spurious character throws upon the taker the duty of notifying his transferrer, and the reasonable time is to be reckoned from that. It was also held that an offer to return the note was dispensed with by the transferrer saying that he will not take back the note till compelled to do so by law. Raymond *v.* Baar, 13 S. & R. 318. One receiving a counterfeit bank-note kept it about six months after the spurious character of the note was discovered, when he gave notice to the defendant. This was held such negligence as prevented a recovery. Thomas *v.* Todd, 6 Hill, 340. A bill was discovered to be counterfeit about May 25, and kept without notice till July 4th following; this was held to be an unreasonable time, and to defeat the remedy.

If the bills are genuine, but at the time of payment by the debtor the bank had stopped payment, this being unknown at the place where the bills were transferred, the loss falls on the payer, because even bank-bills not forged, and supposed to be good, are not absolute payment.(*l*) This seems to be at least

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(*l*) A holder of bank-notes at the moment a bank becomes insolvent is the loser, provided a person to whom he may pass them (however innocently) afterwards be not guilty of laches in attempting to collect them or in returning them to the transferee. Owenson *v.* Morse, 7 T. R. 64. Plate was paid for in notes of Messrs. Shaw, bankers, and left to be engraved. This was after banking-hours, and the bank was never opened again. It was held that an action of trover would not lie for the plate, the notes being no payment. The point is very nice, and we think the question of stoppage *in transitu* entered into the decision. Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235. For had the payment been made in a common promissory note on time, it would have been *payment* and satisfaction; and bank-bills ought to be payment as much as promissory notes, provided the bank be not at the time actually insolvent; but, as will be seen by examining the section on liens and stoppage *in transitu*, the latter right revives, though payment has been made by a note, provided when the note falls due the goods are still in the power of the vendor. In this case the rights of the vendor seem to have been regarded as the same as if he had taken a common promissory note. The bank at the time could not be considered as actually insolvent. It would seem that country bank-notes are not regarded by the English courts as much like money as our bank-notes are regarded by our courts, Pickard *v.* Bankes, 13 East, 20; and perhaps the more so, because the statute mentioned *supra* makes some bank-bills, namely, those of the Bank of England, legal tender. *Expressio unius est exclusio alterius.* No bank-bills can be made tender by State statutes, by provision of the Constitution of the United States. and therefore conventional agreement tends to make all bank-bills as nearly as possible money. Timmins *v.* Gibbins, 18 Q. B. 722, 14 Eng. L. & Eq. 64. M. W. deposited certain bills on a country bank on the 26th of the month; the notes were presented to the London agents of the bank the next day. The bank had stopped payment the 26th. M. W. could not maintain an action for money lent or money had and received. The notes had been immediately retransmitted, and notice of dishonor given to the plaintiff. Turner *v.* Stones, 1 Dow. & L. 122. A £5 bank-bill was changed for the defendant on Saturday. On Monday the banking-house was opened two hours, but no payments were made, and the jury thought the bill would not have been paid if presented. The bank then was closed and became insolvent. The same day the plaintiff sent the note to the defendant, and asked for his money. Held, that the duty of a holder in such case is to give prompt notice of the stoppage of the bank, and to tender the note to his transferrer. In this case the plaintiff had done all he was bound to do. From this and the previous case it seems that, when a bank closes and never opened for payment, the insolvency dates from the time of closing the bank at the close of usual banking-hours. The principle is, that the taker must have been at some time able to get the bill redeemed. Beeching *v.* Gower, Holt, N. P. 313. It appeared a note of a country bank was given in payment, but before the time allowed by the law merchant for presentment had expired the bank failed; yet it was held that the holder was bound to present the note for payment in due time, and by neglecting to do so made it his own. Camidge *v.* Allenby, 6 B. & C. 373 (1827). This is the leading English case on the subject, and may be considered as the law in the

the general rule; but in some of the States of this country

English courts. Goods were sold on the morning of the 10th of December; at three o'clock of the same afternoon bills were given in payment. These were notes of D. & Co., at Huddersfield, who had stopped payment at 11 o'clock, A. M. of the same day; but this was known to none of the parties. The notes were not presented; but on the 17th (one week after) the defendant was required to take back the notes. It was held, that, under the circumstances, the plaintiff could not recover. *Holroyd*, J. seems to regard the notes as payment; "but if promissory notes, the plaintiff was barred by his laches." *Littledale*, J. put his opinion on the ground of laches, and if bank-bills are payment, that the taker has the risk. See Timmins *v.* Gibbins, 18 Q. B. 722, 14 Eng. L. & Eq. 64; Rogers *v.* Langford, 1 Cromp. & M. 637 (1833). The notes were not presented; and although the plaintiff gave notice to the defendant, he did not offer to return the notes for a week. See also Bowes *v.* Howe, 5 Taunt. 30. In the case of Turner *v.* Stones, 1 Dow. & L. 122, Mr. Justice *Coleridge* delivered the opinion of the court, and all the previous cases are most ably reviewed. From the English cases, *supra*, it seems that presentment is not necessary to bind the transferrer, but that there must be a prompt return. In America, the bills must be returned in a reasonable time after their spurious or worthless character is discovered, and what is reasonable is a question for the jury. In England, from some of the cases it appears that the bills must be presented or circulated immediately. We do not think this the rule with American bank-bills. In Phillips *v.* Blake, 1 Met. 156, no opinion is given, but much doubt is cast upon the power of recovery, in case a bill is not actually presented for payment at the bank counter. But the usual rule requiring presentment, even though the payor is insolvent, — Bowes *v.* Howe, 5 Taunt. 30; Sands *v.* Clarke, 8 C. B. 751, — in the case of bank-notes is done away with. See cases *supra et infra*. Roget *v.* Merritt, 2 Caines, 117. This case is much like Owenson *v.* Morse, 7 T. R. 64. Lightbody *v.* Ontario Bank, 11 Wend. 9. The bank had stopped payment on the day before the bill was passed. The transferee, after the refusal of the defendant to accept, deposited the bill with a receiver, and got thirty-three per cent of its amount. It was held to be the loss of the holder at the time of insolvency. The case overrules a *dictum* of *Spencer*, C. J., in Whitbeck *v.* Van Ness, 11 Johns. 414. He says, commenting on Markle *v.* Hatfield, 2 Johns. 455: "We held that the payee did not assume upon himself the risk of forgery, the forged note being received upon the faith of its being genuine; but it is not to be doubted, that, had the bill been *good*, and had the bank failed, *and the parties been equally ignorant of the fact*, the decision would have been different" In this case, a distinction is drawn between bank-bills paid for a contemporaneous and a prior debt, in which distinction we have no confidence. Timmins *v.* Gibbins, 18 Q. B. 722, 14 Eng. L. & Eq. 64, per Lord *Campbell*, C. J.: "There must always be some interval during which the payor was debtor." But as the case went somewhat on that ground, it weakens its authority on the question of payment of a contemporaneous debt. It appears that, if the loss were to fall on the transferee, both parties being in appearance equally innocent, great frauds would be perpetrated; for the transferrer must be presumed innocent until proved guilty, and that can seldom be shown. As in Jefferson *v.* Holland, cited in Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, 260; Fogg *v.* Sawyer, 9 N. H. 365. See Frontier Bank *v.* Morse, 22 Maine, 88. This case was carried to the Court of Errors, — Ontario Bank *v.* Lightbody, 13 Wend. 101, — and affirmed. Chancellor *Walworth* said: "The same principle (that with regard to the notes of third persons for a pre-existing debt) is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties, that, if the bill at the time it is received is in fact what the party receiving it supposes it to be, he

a different system of law prevails. These we refer to in our notes.(*m*)

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is to run the risk of any future failure of the bank. This implied agreement between the parties arises from the fact that bills of this description, so long as the bank which issued them continues to redeem them in specie at its counter, are by common consent treated as money, and are constantly passed from hand to hand as such. The receiving them as money, however, is not a legal, but only a conventional, regulation, adopted by the common consent of the community. . . . . This principle of considering bank-bills as money, which the receiver is to take at his own risk, cannot therefore be carried any further than the conventional regulation extends; that is, to consider and treat them as money so long as the bank by which they are issued continues to redeem them in specie, and no longer." Mr. Gallatin, in his essay on the Currency and Banking of the United States, p. 29, says: "A payment made in bank-notes is a discharge of the debt, the creditor having no recourse against the person from whom he has received the notes, unless the bank has previously failed." Grafton Bank *v.* Hunt, 4 N. H. 488; Fogg *v.* Sawyer, 9 N. H. 365. As to entire or partial worthlessness, see, to the same effect, Lightbody *v.* Ontario Bank, 11 Wend. 9. See also Ex parte Blackburne, 10 Ves. 204; Lovett *v.* Cornwell, 6 Wend. 369; Gilman *v.* Peck, 11 Vt. 516; Frontier Bank *v.* Morse, 22 Maine, 88. See perhaps *contra*, Lowrey *v.* Murrell, 2 Port. Ala. 280. We doubt whether the cases are similar of a bill on a broken bank and a counterfeit bill. A counterfeit bill is as no bill; it is utterly worthless, and of no value; whereas, a bill on a bank is a genuine and true bill, of uncertain value, and perhaps worthless by reason of insolvency. In Wainwright *v.* Webster, 11 Vt. 576, the same was decided, and that the character of bank-notes was conventional. Frontier Bank *v.* Morse, 22 Maine, 88, is to the same effect, and holds that the rule that, where parties are equally innocent or guilty, *potior est conditio defendentis*, is not applicable to cases of money paid by mistake. And if the payor of the bills, when seasonably notified, replies that he will have nothing to do with the bills, it is not necessary that they should be returned by the earliest mail, or tendered to him. In this case the cashier of the bank requested the defendant to give him bills of a large denomination, and those in question were furnished him. In Houghton *v.* Adams, 18 Barb 545, bills on a Maryland bank, which had become insolvent a few hours before, were sold at one per cent discount. It was held that the holder at the time of failure must be the loser. Harley *v.* Thornton, 2 Hill, S. Car. 509, note. The holder of a bank-note at the time the bank stops payment must bear the loss, provided he has been in possession so long that a reasonable time for presenting the note and demanding payment has elapsed. It is always necessary that the note should have been presented within a reasonable time, when the party intends to charge the person from whom he took it. Bank-notes depreciated in value may be taken at full value. White *v.* Guthrie, 1 J. J. Marsh. 503; Honore *v.* Colmesnil, id. 503.

(*m*) Alabama. Lowrey *v.* Murrell, 2 Port. Ala. 280. The *dictum* in Whitbeck *v.* Van Ness, 11 Johns. 409, is quoted, and the decision was upon the ground that in passing bank-notes there was no warranty of the solvency of the maker. The distinction between prior and contemporaneous debts is discarded. It is to be observed, that there was no diligence in attempting to collect, and no offer to return.

Pennsylvania. Bayard *v.* Shunk, 1 Watts & S. 92, is the strongest case on the subject, and the opinion of the court was delivered by Chief Justice *Gibson:* "By the conventional rules of business, a transfer of bank-notes, though they are of the same mould and obligation (as notes of third persons) betwixt the original parties, is regulated by peculiar principles and stands on a different footing." The grounds of the decision are

The same rule applies *a fortiori* to protect one who receives a bill of a broken bank on representation that it is worth its nominal value.(*n*) But if a taker expressly agrees to receive it as genuine, on his own knowledge and at his own risk, the

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"commercial convenience and the inconvenience of reclamations, more than counterbalancing the danger of a crafty man's putting off a counterfeit bill, which he cannot be shown to have known to be on a broken bank." The distinction is very strongly drawn between forged bills and those on broken banks, and we think correctly; but the reason given in the case of a bill on a broken bank, that it is seldom or never worthless, though impaired in value, seems to be met by Mr. Chief Justice *Parker*, in the case of Fogg *v.* Sawyer, 9 N. H. 365, *supra*, who remarks, that any forged or counterfeit coin has some value.

Tennessee. Scruggs *v.* Gass, 8 Yerg. 175. The transfer of an individual's note for a pre-existent debt is mentioned, and the court say it is difficult to distinguish, in law, bank-notes from those of individuals. And it is said: "This court does not say but that Scruggs might have avoided the effect of the payment in bank-notes by having presented them to the bank for payment, and on refusal notified Gass of the fact." This decision seems to turn upon presentment and notice in the case of bank-bills, which we have discussed in another place. The case of Young *v.* Adams, 6 Mass. 182, was one of counterfeit bills.

Delaware. Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, adopts the same rule as the Pennsylvania case. *Layton*, J. dissented. It holds, also, that the effect of a payment in *bank*-notes does not arise from their conventional, but from their legal character. Also, if at the time of a contract a bank-note be paid without indorsement, guaranty, or agreement, it is received *as money*, and the *risk* of the solvency of the bank is on the part of the *receiver*. The distinction is also taken as to prior or contemporaneous debts, and bank-notes are held no payment of the former by any implied agreement, as is the case in a *sale* or *exchange*, or a contemporaneous transaction. And even if the transferrer were liable, from agreeing that the notes should be at his risk, yet he must have proper legal notice to bind him. In this case, Mr. Justice *Layton*, dissenting, denies the distinction between a prior and contemporaneous debt. The case in Delaware is by far the ablest case on the question, and abounds in sound reasons for the same conclusion arrived at in the Pennsylvania case.

Massachusetts. Young *v.* Adams, 6 Mass. 185. See Snow *v.* Perry, 9 Pick. 539, a case in which the bank stopped payment on the day after the bills were received, and in that respect resembling Turner *v.* Stones, 1 Dow. & L. 122. Edmunds *v.* Digges, 1 Grat. 359, decides that there is no warranty of solvency at the time of the transfer of the bank-bills, provided both parties are equally innocent and ignorant. In this case the bills given were in exchange for other bills, and they were given to the transferee at his solicitation, and when the insolvent condition of the bank was discovered, the bills were immediately tendered in return. The point was thus fairly and fully presented to the court, there being perfect innocence and no laches on the one side or the other.

(*n*) Commonwealth *v.* Stone, 4 Met. 43; Gilman *v.* Peck, 11 Vt. 516; Alexander *v.* Dennis, 9 Port. Ala. 174; Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235; Jefferson *v.* Holland, cited 2 Harring. Del. 260. He who receives the bill of a broken bank, on representation made to him that it is worth its nominal value, does not take it at his own risk. The question whether passing a bill on a broken bank and receiving good money in exchange without any words is a representation that the bill is worth what it pur-

law does not prevent his taking this risk upon himself, or make a better bargain for him than he has made for himself.

One exception to the general rule seems to be well established It is, that if a bank receives bills supposed to be its own in payment of a debt due to it, or held for collection from an innocent party, and they turn out to be forged, the bank is nevertheless held. For a bank is obviously bound to know whether bills purporting to be its own are genuine or forged, by a reason stronger than applies to anybody else; (*o*) and the fact of the reception

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ports to be, depends on the attendant circumstances. Commonwealth *v.* Stone, 4 Met. 43. Alexander *v.* Dennis, 9 Port. 174, was a case of fraud, and no notice or return of the bills was held necessary to bind the payor. We have taken cases from those States where payment in bills of a bank already insolvent is at the risk of the payee, or where a bill or note is presumed payment until it is shown to be otherwise. Aldrich *v.* Jackson, 5 R. I. 218.

(*o*) In U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333, it was held that, though in general payment in forged paper is not good, yet that it was not applicable to a payment made *bona fide* to a bank in its own notes. The Bank of Georgia having originally issued the bank-notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States as cash, by way of general deposit. The forgery was not discovered till nineteen days afterwards, upon which notice was duly given, and a tender made of the notes to the Bank of the United States, and by them refused. Both parties were equally innocent of fraud, and it is not disputed that the Bank of the United States were *bona fide* holders for value. In Levy *v.* Bank of U. S., 4 Dall. 234, 1 Binn. 27, a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud the bank refused to pay the amount. The court then said: "It is our opinion, that, when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken. In the latter case the bank would have appeared as plaintiffs; and every mistake that could have been corrected in an action by them may be corrected in this action, and none other." In Bolton *v.* Richard, 6 T. R. 139, carrying a check to the credit of a party was held equivalent to the transfer of so much money in the hands of the banker to his account. In Price *v.* Neal, 3 Burr. 1355, the drawer's name was forged, but the bills were paid by the acceptor, who attempted to recover his money. The court said: "Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it. But it was not incumbent upon the defendant to inquire into it." If, therefore, a drawee is bound to know the hand of the drawer, it follows that a bank is bound to know whether the signatures on its own bills are genuine or not. This case was followed by the stronger case of Smith *v.* Mercer, 6 Taunt. 76, from which decision Mr. Justice *Chambre* dissented. In Gloucester Bank *v.* Salem Bank, 17 Mass. 33, the latter had paid money to the former in its own bills, which were discovered to be forgeries. Notice of the doubtful character of the notes was given in fifteen days, and averments of forgery fifty days, after the bills were taken. The notes were in a bundle which had not been examined

might be regarded, in favor of an innocent party, as an adoption of the bills by the bank. Whether a bank would be so bound if it received these forged bills on deposit, is not settled by authority.(*p*) The case is different. The bank here also should know its own bills, and should give immediate notice if it intended to deny them. It is, however, possible that the bank would not be holden, unless its reception of the bills had in some way exposed an innocent depositor to loss in case they were now returned, which loss would have been avoided had the bank refused at once to receive them as genuine. But the negligence of the bank, if there be any in the view of the law, must be the immediate and certain cause of injury to the depositor. No remote result can be contemplated. And in the case of deposit, we are inclined to think that a bank would not be held to such immediate knowledge and strict diligence as to be required to know and give notice of the character of bills immediately on deposit.

Another question occurs in this connection, which is, how far a bank is bound to know whether the bills of other banks are genuine.(*q*) We see no sufficient reason for saying that the

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by the cashier till a long time had elapsed. The bank was held bound to know its own notes. The court say: "The true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength where the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." This case rests principally on laches. This question has all the authorities on one side, and we must consider the question settled. The case of Price *v.* Neal, 3 Burr. 1354, rests upon Wilkinson *v.* Lutwidge, Stra. 648, and Jenys *v.* Fawler, 2 id. 946. See Smith *v.* Chester, 1 T. R. 654; Barber *v.* Gingell, 3 Esp. 60; Bass *v.* Clive, 4 M. & S. 13.

(*p*) U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333. The bills in this case were received on deposit, but the distinction between bills received in payment or on deposit was not argued. See, also, Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, which would seem fully to sustain the proposition that the case of deposit was not different from that of payment.

(*q*) In Corbit *v.* Bank of Smyrna, 2 Harring. Del. 235, which has been much quoted above, the facts were as follows. The bank received notes of a bank on deposit, which had previously failed. They were held to be bound thereby; but this, it must be remembered, is not a case of forged notes, and it was in a jurisdiction where genuine bills are at the risk of the taker.

bank stands, in respect to the bills of other banks, in any materially different position from that of an individual, in regard to bank or other notes.(*r*)

It must be true on principle, and the proposition rests upon authority, that no loser by forged or insolvent bills can recover without due diligence and due notice to the person who will be affected by his claim.(*s*) And we should say that the burden of proof of this diligence and notice would always lie on the claimant, and the question be one for a jury.(*t*)

If the bills paid are of a bank then actually insolvent, but the insolvency is wholly unknown to either party, the rule we should think most reasonable, on grounds already intimated, and to a considerable extent sustained by authority, is, that the party receiving them is presumed to take them as a conditional payment only; that is, he is bound to all reasonable diligence to collect the bills; but if they are worthless in his hands, in part or for the whole, he may then, if he has used such diligence, or gives such notice as will enable the transferrer to guard against loss, fall back on the party paying them for indemnity.

It must be obvious, however, in this as in the former cases, that this presumption would be overthrown by any evidence of a special understanding or agreement that the receiver took the bills at his own risk, and as absolute payment. And so if any negligence can be attributed to either party, and the loss is in any material degree owing to such negligence, that party should be held to suffer that loss. The case of a partial insolvency we have considered in the chapter on Bank Notes and Bills.

Bank-bills sometimes remain in circulation for a long time; or are locked up by a holder for many years, and then brought out and made use of by him or his representatives. The taker of such bills loses nothing by the mere fact of age, because no statutes of limitation run against bank-bills.(*u*) But the bank may possibly have ceased to exist when the bills were transferred, and all its accounts be closed, and no remedy be open to

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(*r*) Frontier Bank *v.* Morse, 22 Maine, 88.

(*s*) See *supra*, pp. 191 – 194, notes *l* and *m*.

(*t*) See notes *supra*.

(*u*) Dougherty *v.* Western Bank of Georgia, 13 Ga. 287, 299. "We determine that a bank-note is not barred by the lapse of the statutory term commencing at its date, and that generally the statute of limitations has no application to bank-notes."

the holder of its bills. In this case we should say they stood upon the footing of bills of an insolvent bank, and the same rules of law would apply to them. Bank-notes have indeed been known to be paid out and received which have been hoarded for a long time, during which the charter of the bank itself has been several times renewed.

A difficult question has arisen in practice, but has not, so far as we know, passed under adjudication; and possibly it may seem rather a question of notice than of payment. The maker of a note which has been indorsed pays the promisee on maturity in bank-bills which prove to be forged or worthless. This is not discovered till some time after the maturity of the note, and too late to give notice, as upon dishonor, to the indorsers. Would the payee be allowed, upon discovering the fraud, to hold the indorsers by notice given them in reasonable time? On the one side, it might be urged that bank-notes were not money; (*v*) that the bill or note, if made payable in bank-notes, would not have been a negotiable bill or note, or governed by the laws of negotiable paper, and that the holder was entitled to cash; and if he did not take it, he must bear the loss, because it was his choice to receive conditional payment. On the other hand, it may be said that bank-notes are for all these purposes money; that in the payment of notes they are to be regarded as coin; that coin is as likely to be counterfeit as bank-notes, and therefore payment by one is as good as by the other.

From this reasoning we might seem to derive the element of reasonable time being allowed the payee to notify the indorser after he has discovered the worthless character of the bank-bills taken in payment. This question we have not seen decided; but we think it doubtful, if a note be paid in coin which afterwards turns out to be counterfeit, whether any notice could then hold the indorsers. As to them the note is *functum officio*. It has actually been paid as far as they are concerned, and taking the counterfeit money is a matter between the parties; and as to all but the payor and payee the note is dead. If goods are sold, and payment made in bad bills, in the absence of fraud the property in the goods will be held to have passed, and the remedy of the taker of the bad bills is against the vendee in

(*v*) See *supra*.

an action of assumpsit. Trover or replevin for the goods is not in such a case maintainable.

SECTION VIII.

OF PAYMENT OF A PARTNERSHIP DEBT BY THE BILL OR NOTE OF ONE PARTNER.

This subject has been considered generally in a part of a previous chapter. The precise question for present consideration is this. If a partnership is dissolved, and the duty of settling the affairs of the old firm falls upon one or more of the partners, who may or may not, as a new firm, carry on the business, and the creditor of the old firm is induced to continue his relations with the new firm, and in this or some other way to take from the continuing partner or partners negotiable paper for debts due from the old firm, and thereafter the insolvency of such continuing partner or partners takes place, are the original partners still liable for the indebtedness of the old firm?

After some vacillation, it seems to be well settled in England that the responsibility of one partner may be taken instead of the firm's liability,(*w*) provided that he give a negotiable

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(*w*) In Thompson *v.* Percival, 3 Nev. & M. 167, 5 B. & Ad. 925, which was decided in 1834, Lord Chief Justice *Denman* delivering the opinion of the court, the facts were as follows. A and B dissolved partnership, agreeing that B should carry on the business, and should receive and pay all the debts, for which purpose sufficient partnership funds were left at his disposal. C, a creditor, applied to B, and was informed that A knew nothing of his debt, that he, C, must look to B alone. After this C drew a bill on B, which was accepted, but dishonored, B having become bankrupt. Held, that the jury were to determine whether C had agreed to receive B as his sole debtor, and take his acceptance in satisfaction of the debt due to both, — that such an agreement would be a good defence to A by way of accord and satisfaction. In this case, the case of David *v.* Ellice, 5 B. & C. 196, 7 D. & R. 690, decided in 1826, was disapproved. In that case, A, B, and C were partners; A retired, and notice was given to D, a creditor. B and C, continuing business, assumed the funds and debts of the partnership; the balance due D was transferred to his credit by the new firm, on whom he drew bills, which were paid. He fully assented to the transfer. On the insolvency of the new firm, it was held by Chief Justice *Abbott*, that A, the retiring partner, was still liable for the balance not paid. See also Heath *v.* Percival, 1 P. Wms. 682. Among the authorities cited in Thompson *v.* Percival are Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 id. 122. In Thorne *v.* Smith, 2 Eng. L. & Eq. 301, C. B. 1851, it was held that an agreement between the payee and one of several makers of a joint and several promissory note, that

promissory note. It is clear that the agreement of the partners with regard to the settlement of the firm and partnership debts will not affect third parties, who are not privy to such an arrangement. And even if the creditor agree to accept one partner as his debtor, there being no new consideration, the promise would seem to be a *nudum pactum*.

The cases go very far in holding that there must pass to the creditor some new consideration to support a parol agree-

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the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the note. Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Farwell, 15 Beav. 31, 15 Eng. L. & Eq. 70. In Waydell *v.* Luer, 3 Denio, 410, a partner, after the dissolution of the firm, adjusted a note against the partnership by giving some money, and the note of a third party, and his own note for the balance. The creditor received the same, and gave up the note of the firm. The original note was held to be extinguished. So in Sneed *v.* Wiester, 2 A. K. Marsh. 277; Sheehy *v.* Mandeville, 6 Cranch, 253; Wiseman *v.* Lyman, 7 Mass. 286. In Spear *v.* Atkinson, 1 Ired. 262, however, where a creditor of the firm had taken the firm's note for goods, and after the dissolution of the firm taken a bill of exchange drawn by one of the late partners in his own name, which was protested for want of funds in the drawer, and had delivered up the promissory note, such creditor's original claim was held not to be merged by the promissory note or bill of exchange, but that he was entitled to recover the price of the goods. In Pope *v.* Nance, 1 Stew. 354, it was held that, where a creditor received from one partner, after a dissolution of the firm, the paper of third persons in payment of the partnership demand, and in exchange for the paper of the firm, he thereby released the other partners. Nichols *v.* Chears, 4 Sneed, 229; Mims *v.* McDowell, 4 Ga. 182; Stone *v.* Chamberlin, 20 id. 259. In the last case (1856), S and J., partners in trade, gave a firm note for a debt due by the firm. After dissolution, a creditor, knowing this, took the individual note of J. in renewal, giving time of payment without the knowledge of S. Held, that S. was exonerated from all liability. Herring *v.* Sanger, 3 Johns. Cas. 71; Arnold *v.* Camp, 12 Johns. 409. Where a partnership note was given up and a partner's note taken for the amount, it was held to constitute payment. But when one sells goods to an ostensible partner, without knowing that there are dormant partners, and sues on the individual note, even a judgment and execution returned *nulla bona* will not be a bar to an action for goods sold against all the partners. Watson *v.* Owens, 1 Rich. 111; Harris *v.* Lindsay, 4 Wash. C C. 271. In Parker *v.* Cousins, 2 Grat. 372, it was decided that taking a new security from one of two joint debtors will release the other, if in any case, *only* when there is an agreement by the creditor, express or implied, that he shall be released. The case was one in which a partner after dissolution renewed a note in the partnership name; the other partner was not bound on the new note; but neither was he discharged on the old, for there was an intention manifested to retain the partnership liability. The decision of the court was somewhat *obiter*. In Estate of Davis & Desauque, 5 Whart. 530, where the separate note of one partner was taken by a party holding the note of the firm, it was held to be a question of intention whether this amounted to an extinguishment of the joint debt. The onus lies upon those who allege an extinguishment. It is necessary for them to show a special contract to that effect, or that the joint note was given up; and even where that is the case, the presumption may be rebutted by countervailing proof. In this case the

ment.(x) But when new negotiable paper passes from the continuing member to the creditor, there is a new consideration, and this is in general sufficient to support an agreement to release and exonerate the other partner or partners. Whether there be such an agreement is a question for the jury; and the new negotiable paper may be merely collateral security, the original liability being expressly retained.

The law may be stated to be the same on this point in all parts of the United States, although it may not have been expressly decided in the courts of all the States. The authority of both the English and American decisions thus far will be found to

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surrender of the joint note is spoken of as a decisive circumstance, as is also its retention. Mason *v.* Wickersham, 4 Watts & S. 100, is to the same effect. Anderson *v.* Henshaw, 2 Day, 272; Yates *v.* Donaldson, 5 Md. 389; Thompson *v.* Briggs, 8 Foster, 40. "A promissory note, given by the surviving partners for an account against the firm, is not a payment of it, unless it be agreed to be received as such." In Dutton *v.* N. E. Mut. F. Ins. Co., 9 Foster, 153, which is a very good case, it was held that, where E. and D. were partners, indebted to H. and E. for labor performed and materials furnished, which might be a lien upon their buildings, and H. and E. discharged the debt against E. and D., and took the note of D. in satisfaction, the lien, if any, was thereby lost, and the only remedy remaining was on the note of D. In England, by statute 6 Geo. IV. ch. 16, § 62, a bill against a partner is satisfied before the joint debt, in case of a separate adjudication in bankruptcy.

(x) In Lodge *v.* Dicas, 3 B. & Ald. 611, decided in 1820, upon a dissolution of partnership it was agreed between the partners that one should assume the debts to A. Of this A was informed, and expressly agreed to exonerate the other partner from all responsibility; but it was held by *Abbott*, C. J., and *Bayley* and *Holroyd*, JJ., that both partners still remained liable. The case of Smith *v.* Rogers, 17 Johns. 340, seems not unlike this. R. and B. were partners, indebted to the plaintiffs for goods sold. The plaintiffs were informed of their dissolution, and the assumption of the debt by B., with which they expressed themselves satisfied. B. afterwards paid part of the debt, and gave his promissory note for the balance, for which there was a receipt, "When paid, to be placed to the credit of R. & B.'s account with them." When B. became insolvent, it was held that the plaintiffs could recover on the original consideration. In Gough *v.* Davies, 4 Price, 200, A deposited money with B and C, bankers, taking their accountable receipts. B retired, and A continued to leave his money with the new firm, consisting of C and D, a new member, from whom he received interest regularly, giving them no notice, and continuing to receive interest and transact business for four years, until they became insolvent. Held, B, the retiring partner, was still liable. "Nor are those circumstances sufficiently strong to be left to a jury." *Garrow*, B. *dubitante*. It would appear that the accountable receipts of the old firm were retained by the plaintiff. It was held in Kirwan *v.* Kirwan, 4 Tyrw. 491, that mere knowledge by a creditor of dissolution will not release the old partners from liability, though he continue his account, unless there be an express acceptance of the substituted credit of the new partnership. But long credit, or distinctly accepting the new firm's credit, may operate a discharge. Oakeley *v.* Pasheller, 10 Bligh, 548.

accord with the English case at the beginning of the note. In Massachusetts, Maine, and Vermont, however, the same rule with regard to *prima facie* payment by note prevails; and the note of one partner merely, received for the partnership debt, will operate a payment, unless the reverse can be shown to have been the intention of the parties.(*y*)

The New York cases have been very contradictory, and the courts of that State have been disposed in some cases to consider their doctrine, "that the debtor's own promissory note cannot be taken in payment of a precedent debt, even by express agreement," applicable to the discharge of a firm debt by a partner; (*z*) and that the note of one partner cannot be taken in

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(*y*) French *v.* Price, 24 Pick. 13. The negotiable note of one of several persons, whether partners or tenants in common, equally liable for goods purchased, constitutes a payment, and therefore the others are discharged from their liability.

(*z*) In Arnold *v.* Camp, 12 Johns. 409, (see note *w*,) it was held that the note of a partner may be taken as payment when a partnership note is given up, provided such be the agreement of the parties. In Muldon *v.* Whitlock, 1 Cowen, 290, the law of Arnold *v.* Camp was followed and cited with approval, and the partners were held not discharged, because there was no agreement. In Rosseau *v.* Cull, 14 Vt. 83, it is said to be law in New York that one of two joint debtors giving his note will only be a discharge by the agreement of the parties. In Cole *v.* Sackett, 1 Hill, 516, however, this case was disapproved, and where E. and C., being in partnership, gave their note for a precedent debt of the firm, under an agreement that it should be received in full satisfaction and discharge; and afterwards having dissolved, E. agreeing, for a consideration received from C., to assume and pay the debt for which the note was given; in pursuance of which arrangement E. took up the note and gave his own in lieu thereof. Held no bar to recovery on the original consideration. The case of Cole *v.* Sackett was reconsidered and approved in Waydell *v.* Luer, 5 Hill, 448, where the decision was, that giving a negotiable promissory note by one of several partners or joint debtors, for a demand antecedently due from all, will not extinguish their liability, though the creditor expressly accept the note in satisfaction. In this case, also, Thompson *v.* Percival, 5 B & Ad. 925, is mentioned, and regarded as not in accordance with the New York doctrine, which follows. David *v.* Ellice, 5 B. & C. 196. The case of Waydell *v.* Luer, in 1846, was carried to the Court of Errors, 3 Denio, 410, quoted *supra*, and overruled, but not upon the ground that the note of one partner could, by the agreement of the parties, be taken in payment and satisfaction of the partnership debt But *Lott*, Senator, and *Gardiner*, President, took the ground of Thompson *v.* Percival and Arnold *v.* Camp. *Porter* and *Van Schoonhoven*, Senators, held the doctrine of the Supreme Court, and *Talcott*, *Johnson*, and *Hand* seemed to incline to the opinion of the Supreme Court on the point we are discussing. Senators *Backus*, *Denniston*, *Emmons*, *Jones*, *Sandford*, *J. B. Smith*, and *Wheeler* gave no opinions, but voted for reversal. Senators *Dayo*, *Hard*, and *S. Smith* voted for affirmance. In Elwood *v.* Deifendorf, 5 Barb. 398, "This principle, distinctly advanced in Cole *v.* Sackett and in Waydell *v.* Luer, cannot be considered as overruled by the decision in the latter case by the Court of Errors."

satisfaction of a pre-existing debt, even by express agreement. This, though not settled in the Court of Appeals, appears to be the rule of the Supreme Court.

When, as is sometimes the case, a sealed note is given by one partner for the firm debts, the principles of merger would seem to apply, and the debt is therefore extinguished.

SECTION IX.

OF PAYMENT OF BILLS OR NOTES BY RENEWAL.

The renewal of bills and notes presents the question of payment in a different light. Whatever may be the law with regard to payment and satisfaction of a pre-existing *debt* by bill or note, the general custom and understanding of the mercantile world would seem to demand that a new note, given in renewal of an old one which is taken up, as it is termed, should pay and cancel the old note for which it is given.

The banks consider this to be the effect of renewal, even though the old notes are left with the bank, as is frequently the case.(*a*) The old note would be cancelled if it were paid in money, though the same money were immediately loaned to the debtor who had just paid it in.(*b*) There seems to be no need of going through the ceremony of paying down coin, which is to

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(*a*) This is mentioned in Bank of the Commonwealth *v.* Letcher, 3 J. J. Marsh. 195. The fact of leaving old notes with the banks when they are renewed certainly should have no weight in favor of the presumption that the new notes are taken as collateral security, as would be the case where the old note is left in the hands of an individual, for banks almost universally keep the old notes. But in Ex parte Barclay, 7 Ves. Jr. 597, where bills were given in lieu of others, and the old bills allowed to remain, it was held that "in lieu" might be qualified and explained by the fact of their being so allowed to remain. This, however, was not a case of a bank, or where notes are renewed as in America. But delivering to the debtor the old note is held to be no evidence of payment. Olcott *v.* Rathbone, 5 Wend. 490. In Louisiana exactly the opposite rule prevails, and the surrender of the note is evidence of a novation of the debt. Morgan *v.* Creditors, 1 La. 527. So in California, the surrender of a note is *prima facie* evidence of its payment. Smith *v.* Harper, 5 Calif. 329.

(*b*) U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333. This case is quoted to show how the law may dispense with what is really in effect done by a much shorter process, and how the parties' intentions are regarded in ascertaining the effect of their acts. See, also, Slaymaker *v.* Gundacker, 10 S. & R. 75.

be taken away again. Yet renewal amounts to this in the understanding of the parties, and we should think the courts ought to regard this universal understanding in arriving at the intentions of the parties.

Banks renew notes again and again. New sureties are furnished on new notes, and the debtor's own note often taken for one with sureties. The parties, without question, suppose themselves discharged.

Some of the courts seem to admit that renewing a note cancels the old debt, which is merged in the new note.(*c*) But it cannot be regarded as by any means settled; and many of the courts are disposed to make no distinction between the case of a note given for a note, and a note or other simple contract substituted for a prior simple contract debt.(*d*)

(*c*) Slaymaker *v.* Gundacker, 10 S. & R. 75, per *Tilghman*, C. J. In the States of Maine, Massachusetts, and Vermont, where a note is presumed to be payment of a prior debt, of course the new note is presumed to discharge the old. Cornwall *v.* Gould, 4 Pick. 444; Huse *v.* Alexander, 2 Met. 157. In Hart *v.* Boller, 15 S. & R. 162, the same judge delivered an opinion. A note falling due was protested for non-payment. It was renewed, the second one being for the same sum, and by the same parties. This was not paid, neither was it protested or notice given the indorser, who was defendant. The question was, whether the second note was a discharge. Per *Tilghman*, C. J: "It is a general rule, that, if one indebted to another by note gives another note to the same person for the same sum, without any new consideration, the second note shall *not* be deemed a satisfaction of the first, unless so intended and accepted by the creditor. But if so accepted, it is a satisfaction. The *quo animo* it was accepted is matter of fact, which the court cannot take to itself, and exclude the jury from the decision of it. The intent may often be deduced from circumstances, though nothing positive was expressed."

(*d*) Bank of Commonwealth *v.* Letcher, 3 J. J. Marsh. 195. In Olcutt *v.* Rathbone, 5 Wend 490, the cashier of a bank accepted, in payment of a note falling due, a check of a third person for a part of the amount and a new note for the balance; it was held, that on the check being dishonored an action might be maintained on the original note against the maker to recover the amount of the check, and that the delivery of the old note was no evidence of payment. In M'Guire *v.* Gadsby, 3 Call, 234, citing as authority Roades *v.* Barnes, 1 Burr. 9, Cumber *v.* Wane, 1 Stra. 426, it was held that promissory notes could not be extinguished by subsequent notes given by the same parties. This seems to be the strict rule of law. In Gordon *v.* Price, 10 Ired. 385, it is said that the acceptance of a bill or note on another bill or note is not a discharge of the first note or bill, without a specific agreement that it shall be, *or unless the intention appears;* but due diligence must be used in endeavoring to collect the second bill. In Weakly *v.* Bell, 9 Watts, 273, 280, the renewal of notes was held payment only when so intended; but this is the question, whether the intention in most renewals should not establish a presumption of fact, that when a note is exchanged for a new one, the old one is discharged. But in Crocket *v.* Trotter, 1 Stew. & P. 446, it was said that the agreement must be *express*, to render the new note a discharge of the

When a good note is exchanged for one void or worthless from any cause, as usury, the former contract is not thereby avoided.(*e*) The debtor has not given that to the creditor which the creditor supposed, and therefore the creditor is not bound thereby. Nor would an exchange or renewal of notes be held a payment and discharge, if such discharge would injure the creditor.

Even in those jurisdictions where a note is paid by one given for it in most cases, this is not the case where by such a presumption a mortgage debt would be lost; there is no ground then for thinking that the parties so intended, and the courts hold that such notes are not intended as payment and satisfaction, and that the original debt continues so far as to sustain the mortgage.(*f*)

We would carefully distinguish between a note given in exchange for a note, and the payment of a note by a check, draft, or order, which is dishonored.(*g*) In taking a check, there sel-

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old. It seems that surrender of the note is evidence of a novation in Louisiana. Morgan *v.* Creditors, 1 La. 527. But receiving new notes operates no novation. Hobson *v.* Davidson, 8 Mart. La. 431. But if the holder take a new note, with the same maker, but other security, this will be a discharge of the old note. Coco *v.* Lacour, 4 La. 507. Poth. Oblig., No. 559: "If since the debt was contracted a new agreement has taken place between debtor and creditor, by which a *longer time of payment has been given*, or a new place of payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a less one, to which the creditor was willing to confine his demand; in all these cases, and the like, according to the principle that the novation is not to be presumed, it must be decided that there has been no novation, and that the parties intended only to modify, diminish, or augment the debt, rather than to extinguish it, in order to substitute a new one for it, if they did not explain themselves." Merlin, Rep. de jur. novation, § 5.

(*e*) Chastain *v.* Johnson, 2 Bailey, 574. The plaintiff sold a parcel of cotton to the defendant on a credit, and took a note for the amount, which was surrendered, and received a new note for the amount of the debt, with the addition of usurious interest. Held that no action would lie upon the new note, but the price of the cotton was recoverable, for which he had given a perfectly valid note.

(*f*) Watkins *v.* Hill, 8 Pick. 522; Pomroy *v.* Rice, 16 Pick. 22. In the former case it was held that the mortgage remained a good security for the second note. In the opinion, by *Parker*, C. J., there is a *quære* as to the effect of the exchange as to an innocent third party claiming as purchaser from the mortgagor. In the latter case, a *feme sole* held the mortgage and note. The latter was delivered up by her husband, who took a new note for principal and interest. This was held no payment of the mortgage debt as against even a grantee of the mortgagor, thus answering in the affirmative the *quære* in the former case.

(*g*) Morgan *v.* Bitzenberger, 3 Gill, 350. Here the note given for the original consideration was surrendered for an order of the debtor on F, by whom it was dishonored.

dom or never appears an intention of receiving it, unless duly honored, as payment or satisfaction. Of course a check or draft may be by agreement taken for a note, and so operate a novation.(*h*) But if the drawer knows at the time that the draft will be dishonored, and has no funds in the drawee's hands, it might be doubted if an agreement to take it in payment would be binding on the creditor. Such an agreement seems tainted with fraud. This topic has been considered in the chapter on Checks. When, however, a second unobjectionable bill is given in good faith, in lieu of the first, the presumption that the first is paid thereby is reasonable, and we see no ground for permitting the creditor to resort to the former.(*i*)

SECTION X.

FRAUDS.

A BILL, check, or note has been held to be earnest or part payment under the 17th section of the Statute of Frauds.(*j*)

If a party who gives a bill knows at the time that it is of no value, the holder may, when he discovers the fraud, sue the party on his original liability; or if the bill be given for goods, the sale being tainted with fraud on the part of the vendee, the vendor may consider it void, and retake his goods without breach of the peace, or maintain replevin or trover for them; or he may affirm the sale, and sue for his purchase-money.(*k*)

This was held no bar or payment, but was held to account for the absence of the note at the trial, at which the action was on the original consideration. Smith *v.* Harper, 5 Calif. 329.

(*h*) Helme *v.* Middleton, 14 La. Ann. 484.

(*i*) Dillon *v.* Rimmer, 1 Bing. 100, per *Dallas*, C. J.

(*j*) Chit. Cont. 397; Chit. Bills, 7th ed., 97, 8th ed., 80, note *b*, 84; 10 Peters, Abr. 128, note *x*. Giving a note when it amounts to payment, or even when it is payment, till dishonored, takes a case out of the Statute of Frauds. But it would seem that in New York, where a note of the debtor *cannot* be payment, it does not take a contract out of the statute; but it may be different with the note of a third party. Combs *v.* Bateman, 10 Barb. 573. In Massachusetts, the debtor's own promissory note would probably amount to such payment as the statute requires, and the law would be the same in Maine and Vermont.

(*k*) Thurston *v.* Blanchard, 22 Pick. 18. In this case the vendee got the goods by fraudulent representations, and gave his note for the sum. There had been no tender

We apprehend that the rule of law, or the principle which must govern such cases, is substantially that which was laid down by Lord Tenterden. It must rest the decision of the question of fraud upon the mind, the intent, of the purchaser. For if he supposed himself to have reasonable ground for expecting that the check would be paid, the transaction cannot be deemed fraudulent as to him, and therefore the property would pass. But if he knew that there was no such reasonable ground for this expectation, the transaction would be fraudulent, and the vendors entitled to recover their property in any proper action.(*l*) So where a vendor is deceived by the vendee by fraudulent representations as to the solvency of the maker of the note,(*m*) the note is no satisfaction. All these cases rest upon the principle that fraud defeats all contracts, and renders them voidable in favor of the innocent party, who has his election whether he will confirm them or not.(*n*)

In conclusion it may be remarked, that we think the tendency of the courts in Maine, Massachusetts, and Vermont is to make the presumption of payment less and less strong, and so to conform to the great weight of authority on the other side of the question ; and we might expect that the difference in this respect will disappear altogether. And perhaps it may be hoped that the obvious desirableness of this result will lead the courts of these States to consider it with favor.

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of the note, but he was allowed to recover, provided the note could be delivered up. *Shaw*, C. J. intimates that replevin also may be maintained. Buffington *v.* Gerrish, 15 Mass. 156; Kimball *v.* Cunningham, 4 id. 502; Stevens *v.* Austin, 1 Met. 557. B received A's promissory note for goods, which the latter got by fraud and sold to C, who also had knowledge of the fraud. B was allowed to maintain trover against C for the goods.

(*l*) See *supra*, p. 85.

(*m*) Alexander *v.* Dennis, 9 Port. Ala. 174.

(*n*) Ford *v.* Atwater, 1 Root, 58; Hanks *v.* M'Kee, 2 Litt. 227; Kimball *v.* Cunningham, 4 Mass. 502; Seaver *v.* Dingley, 4 Greenl. 306.

CHAPTER VIII.

OF PAYMENT, SATISFACTION, AND RELEASE.

SECTION I.

TO WHOM AND WHEN PAYMENT SHOULD BE MADE.

PAYMENT of a note or bill should be made directly to the holder and legal proprietor of it.(*a*) And the benefits and rights of payment accrue only to one who was compellable to pay. Hence a question has arisen whether a later indorser, who was not duly notified, may waive that defence, and by paying the note acquire a right against an earlier indorser. It cannot be doubted that, if the earlier indorser be duly notified, so that his obligation is fixed, a later indorser who pays the money to a holder, and takes the note up, although having a good defence, which he does not choose to make, is nevertheless entitled to sue

(*a*) If the money finds its way to the holder's hands, and is treated by him as a liquidation of the debt, it amounts to payment. In Field *v.* Carr, 5 Bing. 13, 2 Moore, & P. 46, the circumstances were as follows: A drew a bill on the defendant, which he accepted. Then A indorsed the bill to the plaintiffs, who were his bankers, and it was entered to the account of A, and being presented at maturity was dishonored. The plaintiff-bankers then debited A with the amount, but did not return the bill to him. A few days afterwards the defendants paid the amount to A, who still continued his banking account with the plaintiffs, and at various times paid in money to them; the balance was at no time in his favor, but he had paid in more than sufficient to cover the amount of the bill and the items of account which preceded it. A failed, and his bankers, the plaintiffs, proved their whole balance under the commission, and then brought this action against the acceptor. It was said by *Best*, C. J., that the "payment (to A alone) would not have discharged the defendant, the plaintiffs having been at that time the holders, and entitled to the amount of the bills; but the ground on which the defendant is discharged is, that the plaintiffs not only entered the bills to the credit of A, but treated them as having been paid." In Pratt *v.* Foote, 5 Seld. 463, one offered the bank in payment of a note a customer's check on the bank; the bank refused it, but said that if funds came in before the note was due, they would apply the funds This was not the case till afterwards, but the bank marked the note as paid, and this was held a payment.

the earlier indorser in the right of the holder from whom he takes the note, or is remitted to his own rights as indorsee, and may sue the earlier indorser, as he might have done had he continued holder.(*b*) It has been decided, however, and for reasons of weight, that if an indorser has another note given him to secure and indemnify him for his indorsement, and, not being notified as indorser, waives this defence, and pays the note voluntarily, he does not thereby acquire a right to enforce the note which was given him for his indemnity.(*c*)

Payment may be made to one authorized personally by the owner, or authorized by his office and character, to receive the money.(*d*) This of course includes one who is legally authorized by the holder or owner to receive payment as a factor (*e*) or attorney,(*f*) and one of several partners to whom, as a firm, the

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(*b*) See Ellsworth *v.* Brewer, 11 Pick. 316; Emerson *v.* Cutts, 12 Mass. 78; Poth. Pl. 142, 143, 164.

(*c*) Bachellor *v.* Priest, 12 Pick. 399.

(*d*) A presentment by any person in possession of a bill *bona fide* is sufficient to charge the parties to the bill. Per *Wilde*, J., in Bachellor *v.* Priest, 12 Pick. 406. Bayley on Bills (Phil. and Sewall's ed.), 141. In the case cited it appeared that the last was a special indorsement, — "Pay to J. Flewelling, Esq., Treasurer," — but the presentment was made by one Dunscombe, to whom it was delivered by the bank of the Hudson & Delaware Canal Co. Of course one entitled to make presentment and demand must be entitled to receive payment of the money. Payment made to a person found in a merchant's counting-room, and appearing to be intrusted with the business of such merchant, is a good payment to the latter, though such a person was never employed by the merchant for any such purpose. Barrett *v.* Deere, Moody & M. 200; Corfield *v.* Parsons, 1 Cromp. & M. 730, 733. The production alone of the bill of exchange, indorsed in blank, is in general sufficient authority to warrant a payment to the bearer; for the possession is presumptive evidence of ownership, or at least of agency, without being the habitual agent. Owen *v.* Barrow, 4 Bos. & P. 101; Anonymous, 12 Mod. 564; Paley, Principal and Agent, 181; Ward *v.* Evans, 2 Ld. Raym. 928; Little *v.* Obrien, 9 Mass. 423; Sterling *v.* Marietta, &c. Trading Co., 11 S & R. 179; Mauran *v.* Lamb, 7 Cowen, 174; Gorgerat *v.* M'Carty, 2 Dallas, 144; Hunter *v.* Kibbe, 5 McLean, 279; Bachellor *v.* Priest, 12 Pick. 399; Sherwood *v.* Roys, 14 id. 172; Banks *v.* Eastin, 15 Mart. La. 291; Adams *v.* Oakes, 6 Car. & P. 70. If a note belong to a bank, the cashier thereof is, by virtue of his office, entitled to make demand of payment, or to authorize a sub-agent. Hartford Bank *v.* Barry, 17 Mass. 94. A payment to the bank to whom the note is indorsed for collection discharges the maker. Smith *v.* Essex Co. Bank, 22 Barb. 627; Montgomery Co. Bank *v.* Albany City Bank, 3 Seld. 459; Colvin *v.* Holbrook, 2 Comst. 126; Commercial Bank of Pennsylvania *v.* Union Bank of N. Y., 1 Kern. 203.

(*e*) Favenc *v.* Bennett, 11 East, 36. Payment should not in general be made to a mere sub-agent. Yates *v.* Freckleton, 2 Doug. 622.

(*f*) Coore *v.* Callaway, 1 Esp. 115, 116; Coles *v.* Bell, 1 Camp. 478, note;

debt is due (*g*) upon the negotiable paper. But although it used to be said that, if a bill were payable to A alone, A must appear and demand payment,(*h*) we think this rule must now be relaxed. We admit that payment must be made to A, or his authorized agent. If a bill be payable to A, to the use of B, the payment should be made to A only, or his agent or indorsee.(*i*) And it has been held, that, when a bill or note has been indorsed to an agent merely to receive payment, and this is known to the payor, such agency is revoked by the death of the principal; and if that be known to the payor, and he makes payment to the indorsee, it will be no discharge of his liability.(*j*)

Payment may be made to the representatives of a dead owner,(*k*) the assignees of a bankrupt,(*l*) the guardian of an infant (*m*)

Spybey *v.* Hide, id. 181. The payment can only be made, as it seems, to one who has authority to demand it, and who can also give a discharge. The agent or clerk of the plaintiff's attorney has been held not authorized to make a demand. See cases *supra;* also, Yates *v.* Freckleton, 2 Doug. 622. Nor would a payment to the wife of the owner of a bill, unless she were the authorized agent of her husband, be sufficient to discharge the debtor. Solomons *v.* Dawes, 1 Esp. 83. Sawyer *v.* Cutting, 23 Vt. 486, shows that the wife is not presumed to be the husband's agent. Benjamin *v.* Benjamin, 15 Conn. 347; Lane *v.* Ironmonger, 13 M. & W. 368; Freestone *v.* Butcher, 9 Car. & P. 643.

(*g*) Duff *v.* East India Co., 15 Ves. 198, 213.

(*h*) Marius, 4th ed., 34; Sigourney *v.* Lloyd, 8 B. & C. 622, 3 Man. & R. 58, 5 Bing. 525, 3 Moore & P. 229, 3 Younge & J. 220. See chapter on Transfer, as to restrictive and qualified indorsements; also, Edie *v.* East India Co, 2 Burr. 1216, 1227, 1 W. Bl. 295; Treuttel *v.* Barandon, 8 Taunt. 100, 1 J. B. Moore, 543; Snee *v.* Prescot, 1 Atk. 245; Poth. Pl. 89.

(*i*) Cramlington *v.* Evans, 2 Vent. 307, Carth. 5; Marchington *v.* Vernon, 1 B. & P. 101, note *c;* Smith *v.* Kendall, 6 T. R. 123, 1 Esp. 231. See chapter on Transfer, for a discussion of restrictive indorsements.

(*j*) Poth. Pl. 168; 1 Pardess. 437, 438; Mar. 72, 73. See Tate *v.* Hilbert, 2 Ves. Jr. 111; Williamson *v.* Thomson, 16 Ves. 443. Marius objects to this doctrine, Pl. 219, Lex Mercatoria.

(*k*) Poth. Pl. 166. And it has been held, that one who pays over to one who has obtained probate of a forged will, will be protected. Allen *v.* Dundas, 3 T. R. 125. A probate, so long as it remains unimpeached, cannot be questioned in the temporal courts. Rex *v.* Vincent, Str. 481. *Contra*, Rex *v.* Goodrich, Old Bailey, 1784; Rex *v.* Fauntleroy, 2 Bing. 413, 1 Car. & P. 421.

(*l*) If a banker or agent become bankrupt, his assignees may receive payment of a note or bill without thereby being liable to an action of trover by the real owner of the paper. They will merely be liable to pay over to the true proprietor. Jones *v.* Fort, 9 B. & C. 764, 4 Man. & R. 547; Tennant *v.* Strachan, Moody & M. 377, 4 Car. & P. 31.

(*m*) Payment of a bill beneficial to a minor, made to the infant himself, is said to be valid, though it should be made to the guardian. Poth. Pl. 166.

or insane person,(*n*) or to the husband whose wife is the payee or holder.(*o*) But a wrongful holder and detainer of the bill has no right to be paid, and the promisor has no right to pay him.(*p*)

If the payment be indirect, as to a banker who has the bill, and because of such payment credits the payee to that amount in account with the bank, the bill will be considered paid.(*q*)

Payment, as we have seen, to one whose right to receive depends on a forgery, does not discharge the payor.(*r*) So any

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(*n*) Payment to one who is *non compos mentis* and under guardianship is not valid, the payor having knowledge of the guardianship. Leonard *v.* Leonard, 14 Pick. 280. The ward in this case had in his possession a promissory note payable to himself. The letter of guardianship was held to be conclusive evidence that the ward was not of sound mind, and therefore not entitled to receive payment. White *v.* Palmer, 4 Mass. 147. In this case, too, the ward had possession of the note, but the court held that there was no reason for the defendant to believe that the ward was the agent of the guardian.

(*o*) If a payment be made to a married woman, after knowledge of her marriage, without concurrency of her husband, the person who makes such payment would not be discharged. Barlow *v.* Bishop, 1 East, 432, 3 Esp. 226, note. An effectual indorsement of the note of a *feme covert* is to be made in the husband's name, Barlow *v.* Bishop, 3 Esp. 266; or such a note may be declared upon as payable to the husband, per *Richardson*, J., in Arnold *v.* Revoult, 1 Brod. & B. 443, 4 J. B. Moore, 66, 72.

(*p*) Netterville *v.* Stevens, 2 How. Miss. 642.

(*q*) Field *v.* Carr, 5 Bing. 13, 2 Moore & P. 46. If a bill be sent to a drawee who is directed to pass it to the holder's credit, and does so, the bill is paid, and is *functus officio*. Savage *v.* Merle, 5 Pick. 85.

(*r*) Smith *v.* Sheppard, Sel. Cas. 243, Ms. of Mr. Sergeant Bond, Chitty, 9th ed., 261. The plaintiffs, assignees of Bagnall and Hand, sued the defendants at London Sittings, after Hilary T., 16 Geo. III. The defendant was indebted to the bankrupts, B. and H., in £30, for goods sold Oct. 1774. Comberstall, the bankrupts' servant, brought a bill of parcels in the same handwriting that all their former bills had been, and fraudulently said his master was in want of cash, and desired he would accept a bill of exchange, which C. immediately drew, signed with his own name, payable to Bagnall and Hand or order, and gave a receipt for the bill of parcels. The defendant accepted the bill, and C. afterwards carried it away. The bill was brought to the defendant by Spencer, who had it in payment for goods. The names of Bagnall and Hand were indorsed on the bill, and the defendant paid it; but that indorsement was a forgery. It was the bankrupts' practice to deliver in their bills at Christmas, but on the Christmas following this transaction no bill was handed in to the defendants. No evidence appeared in whose handwriting the indorsement was, but it did not appear to be like the bankrupts' or like Comberstall's. Lord *Mansfield* said: "Each party is innocent; the question is on whom the loss must fall. It should be on him who is most at fault. It is admitted that Comberstall used to receive money, but not draw bills. Here is a bill that does not trust Comberstall at all, for it is to pay to the order of the bankrupts; in this case, if he had been used to draw bills, that would not vary the case, because it is pretended that the indorsement is by Comberstall; then he that takes a forged bill must abide the consequence, for the man whose name is forged knows nothing of it. In this case the name of Bagnall & Hand is forged; it could

one may pay a bill for honor of a drawer or other party (after protest, not before), and thereby acquire a claim against the party for whom he pays, and all who are liable to him; but not unless that party's signature is genuine, for the risk of this is on him who pays for honor.

A payment to a thief or finder of a note transferable by delivery will not, as we have seen, discharge the payor, unless made in good faith, without knowledge or direct means of knowledge, and in the usual course of business.(*s*) Payment to a wrong

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not be paid without their hand, and the defendant has been negligent in inquiries whether it was their hand or not. The ground which defendant relies on is, that the bill was not delivered at Christmas, as usual; but that is no weight, because it had been delivered before in October." Verdict for the plaintiffs. Esdaile *v.* La Nauze, 1 Younge & C. Exch. 394; Johnson *v.* Windle, 3 Bing. N. C. 225, 3 Scott, 608. In Smith *v.* Chester, 1 T. R. 654, the indorsee who sued the acceptor of a bill was nonsuited, because he could not prove the handwriting of the indorser, although it was upon the bill when accepted. Per *Buller*, *Ashhurst*, and *Grose*, JJ. in this case of Cheap *v.* Harley, cited in Allen *v.* Dundas, 3 T. R. 127; *Buller*, J., Mead *v.* Young, 4 id. 28. In this case the note was payable to H. Davis or order, and indorsed by one H. Davis, not the real payee. It was held by the majority of the court, *Ashhurst*, *Buller*, and *Grose*, in opposition to the opinion of Lord *Kenyon*, that the indorsee took no title. Lord *Kenyon* thought the case could not be distinguished from Miller *v.* Race, 1 Burr. 452, which was a case of a note payable to bearer (Chit. Jr. 467). Gibson *v.* Minet, 1 H. Bl. 569, 607 (Chit. Jr. 479). In a case in Massachusetts, it appeared that a note was made by one Brown, payable to T. Jackson, Jr., and his name indorsed thereupon, but shown to be a forgery. Under the forged name of the payee was the name of Fearing, the defendant. The note was presented to the bank for discount by Brown, the maker of the note. State Bank *v.* Fearing, 16 Pick. 533, per *Shaw*, C. J. The indorser was held by his signature to admit the validity of the previous signatures. It seems plain, however, that no action could have been maintained against Brown, the maker, unless his presenting the bill at the bank would have operated in that way as far as he was concerned. Bayley on Bills, 313. Critchlow *v.* Parry, 2 Camp. 182; Lickbarrow *v.* Mason, 2 T. R. 63. In Morgan *v.* Bank of the State of N. Y., 1 Duer, 434, 1 Kern. 404, the defendants, on being sued for money deposited, produced a check payable to Corlies & Co., and an indorsement in the name of the payee, which was shown to be a forgery. The bank was still held liable to the depositor. Coggill *v.* American Exch. Bank, 1 Comst. 113; Weisser *v.* Denison, 6 Seld. 68. The very doctrine contended for in State Bank *v.* Fearing, 16 Pick. 533, has, we think, been held in England in the cases of East India Co. *v.* Tritton, 3 B. & C. 280, 5 D. & R. 214; Smith *v.* Mercer, 6 Taunt. 76, 1 Marsh. 453. But the ground of these decisions is stated to be this, that each indorsement is a warranty of the validity of the prior indorsements; and this also seems to be the doctrine of the French writers, and has been adopted by the Code de Commerce, 140; Pardess. 376. See also Lovell *v.* Martin, 4 Taunt. 799. Even a *bona fide* holder who claims under a forgery has no right to be paid. Mead *v.* Young, 4 T. R. 28; Long *v.* Bailie, 2 Camp. 214, note; Forster *v.* Clements, 2 Camp. 17; Johnson *v.* Windle, 3 Bing. N. C. 225, 3 Scott, 608; Hall *v.* Fuller, 5 B. & C. 750.

(*s*) Miller *v.* Race, 1 Burr. 452, per Lord *Mansfield*. The note was payable to bearer, and had been obtained by robbing the mail; but an innocent holder was allowed to

party of a note or bill long dishonored, or of a check long after it was drawn, or of a check which had been torn into pieces, and these pieces afterwards pasted together, does not discharge the payor.(*t*)

An acceptor or maker should pay a bill or note at any time when demanded on the day when it falls due, and if not paid, protest may be made or notice given at once.(*u*) But as the

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recover on it, and therefore, although the banker had notice that a bill or note was lost or stolen, yet, if the holder be a *bona fide* one, he may recover upon the note, and the banker may pay such a one, and be protected. Pearson *v.* Hutchison, 2 Camp. 211, 6 Esp. 126.

(*t*) Scholey *v.* Ramsbottom, 2 Camp. 485, per Lord *Ellenborough*. See chapter on Checks, for a full collection of authorities.

(*u*) This demand should be made within the business hours. A banker at whose house a bill is made payable, or on whom a check is drawn (see chapter on Checks), must pay the check or bill on its presentation, or he renders himself liable to an action at the suit of the drawer. Marzetti *v.* Williams, 1 B. & Ad. 415, 1 Tyrw. 77, note *b*. But to render a banker so liable, the bill or check must be presented during banking hours. Whitaker *v.* Bank of England, 1 Cromp. M. & R. 744, 6 C. & P. 700, 1 Gale, 54. The notice may be given at once. Ex parte Moline, 1 Rose, 303; Burridge *v.* Manners, 3 Camp. 193; Leftley *v.* Mills, 4 T. R. 170; Haynes *v.* Birks, 3 B. & P. 599. In Leftley *v.* Mills, 4 T. R. 170, this rule, which is now well established, was laid down with great clearness by *Buller*, J. In this case a clerk called with the bill upon which the question arose at the house of the defendant, the acceptor, on the day it became due; but not finding him at home, left word where the bill might be found, that the defendant might send for it and take it up. This not being done at six o'clock in the evening, it was noted for non-payment. Between seven and eight o'clock the same clerk called on the defendant again with the bill, who then offered to pay the amount of it, but refused to pay an additional half-crown demanded for the notary. Lord *Kenyon* was of the opinion that the notice was sufficient, and directed a verdict for the defendant. But it seems that the protest on the bill was not authorized by any statute, and therefore that there was no reason why the acceptor should be charged with costs of protest. See Greeley *v.* Thurston, 4 Greenl. 479, per *Weston*, J., criticising Lord Kenyon's decision, and adopting the rule of Mr. Justice Buller, that a demand at a reasonable hour upon the day of payment is sufficient to charge maker, acceptor, or indorser of negotiable paper, who may be sued upon that last day of grace or payment. If, then, after demand upon the last day of grace, the right of action becomes vested in the holder, he may of course be justified, if he commences an action, in demanding all costs which have already accrued in addition to the sum already due. Nor do we think that, if an indorser were fixed by notice and suit commenced after demand on the last day of grace, that tender of the mere sum due by the maker or acceptor would release the indorser so liable. It has been decided also, in Shed *v.* Brett, 1 Pick. 401, and City Bank *v.* Cutter, 3 id. 414, that after demand and notice the indorser may be forthwith sued, without waiting for the expiration of the day on which the note falls due. "It would be a very extraordinary doctrine," says *Weston*, J., in the case cited *supra*, "to hold that he (the indorser) might be sued before any action could be sustained against the principal and ultimate debtor. If, therefore, an action lies against the indorser, it must equally lie against the maker or acceptor."

payor has the whole day, if he afterwards in the course of that day makes the payment, this is good as respects himself, and invalidates the notice to other parties.(*v*)

It can be paid before it is due only at the peril of the party paying; so that if a check be post-dated, and paid to a thief or finder on a day before that on which it is dated, the bank loses

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(*v*) Hartley *v.* Case, 1 C. & P. 555, 4 B. & C. 339, 6 D. & R. 505. This probably rests upon the same grounds with the old rule, that a debtor has till the last hour of the day of payment. Hudson *v.* Barton, 1 Rol. 189, per Lord *Coke;* Anonymous, F. Moore, 122; Rockingham *v.* Oxenden, Salk. 578. The plea of tender by an acceptor *after* the day of which the bill falls due is insufficient. Hume *v.* Peploe, 8 East, 168. With regard to drawer and indorser of a bill, or indorsers of a note, a different rule may be thought to prevail. The drawer or an indorser is only conditionally liable, and is only bound to pay when notice and request have been made. Therefore it has been said, that a plea of tender after the bill became due might be good on the part of a drawer or indorser, because they have a reasonable time in which to pay. Byles on Bills, 176, note *w.* See Walker *v.* Barnes, 5 Taunt. 240, 1 Marsh. 36; Soward *v.* Palmer, 8 Taunt. 277, 2 J. B. Moore, 274. But we think this doctrine may be considered as doubtful. In Siggers *v.* Lewis, 1 C. M. & R. 370, 4 Tyrw. 847, 2 Dowl. 681, a plea was held bad which alleged as defence that the indorser had not had a reasonable time to pay before the action was commenced. It appears, however, that late cases have held that an action may be commenced against an indorser on the last day of grace, and the writ may be served before due notice of dishonor could reach the indorser by course of mail. (See Vol. I. p. 411, note *m.*) Shed *v.* Brett, 1 Pick. 401. In this case we think the doctrine that the indorser has a reasonable time to pay the bill is entirely exploded by *Parker*, C. J., who says: "If the putting the letter into the post-office is notice in itself, which we have shown, then it was given before the commencement of the suit. And it would be mischievous to decide otherwise, for every plaintiff's right of action would commence at different times, according to the distance of the party sued; and the time of suing must be conjectured, as it cannot be known when the notice will be actually received. Besides, if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance; for the holder must wait till his letter is received, and for a reasonable time afterwards for the party receiving it to come and pay the money. Who would take a bill or note remitted from New Orleans if this doctrine be correct? and if the parties liable be beyond sea, such instruments would be mere waste paper. If the bill should not be accepted, or the indorsed note not paid, the unfortunate holder, with property belonging to the drawer or indorser before his eyes, must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself without the power of arresting it." In Stanton *v.* Blossom, 14 Mass. 116, the suit was commenced upon the morning the bill was dishonored, and notice put in the post-office afterwards. A doctrine which would lead us to the same conclusion by analogical reasoning, is found in the bankrupt cases, where, though the drawer or indorser could not have possibly received notice, yet the claim, upon showing notice given, may be proved under the commission. Bayley on Bills, 4th ed., 264; Milford *v.* Mayor, 1 Doug. 54; Bull. N. P. 269; Chilton *v.* Whiffin, 3 Wils. 13; Macarty *v.* Barrow, 2 Stra. 949; Forman *v.* Jacob, 1 Starkie, 46; Watson *v.* Loring, 3 Mass. 557; Chitty on Bills, 3d ed., 169, 184; Puckford *v.* Maxwell, 6 T. R. 52; Starey *v.* Barns, 7 East, 435.

the money.(*w*) And if negotiable paper be paid before it is due, and afterwards be indorsed for value, as indorsees cannot know or guard against such payment, it constitutes no defence against their claim.(*x*)

SECTION II.

OF THE RIGHTS ARISING FROM PAYMENT.

One who pays a bill or note at maturity has a right to the possession of it, at least if it be negotiable.(*y*) Nor should an

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(*w*) Chitty, 148.

(*x*) Burbridge *v.* Manners, 3 Camp. 193; Morley *v.* Culverwell, 7 M. & W. 174. See note in former case. The rule laid down by Chitty is, that an indorsement cannot in general be made after payment so as to affect any of the parties except the person making such indorsement. Mr. Chitty says nothing about such a payment being in due course of time, and not by anticipation. The distinction seems to be one that is entirely necessary and justified by the laws of negotiable paper. It is plain that, when a promisor does pay a note before maturity, he should be careful to have it destroyed; otherwise, if it gets into circulation it must deceive an innocent person, who, if the bill were past its maturity, would be put upon his guard against imposition. In Baker *v.* Wheaton, 5 Mass. 512, *Parsons*, C. J. says: "If the promisor has *bona fide* paid the note to the promisee while it was his property and unassigned, if the promisee should afterwards fraudulently indorse it to an innocent purchaser for a valuable consideration, yet the promisor might defend himself by proving a payment prior to the transfer, because by the payment the note was *ipso facto* discharged, and there was no subsisting contract to assign. If the law were not so, the maker of a negotiable note might often be injured. He cannot demand a delivery of the note as a previous condition of payment; but he must pay the money due, and if a delivery is refused, his remedy is by proving payment, which will avail him against a subsequent indorsee." The terms of the rule, as laid down by the Chief Justice, would certainly include notes paid before maturity, as well as those paid at maturity, and therefore affected with equities as to all subsequent parties taking after such payment. The case under consideration was one of an indorsement *after* maturity, and the payment by the maker was spoken of as compulsory, and this was a reason why protection should be extended to him. This certainly could not apply to one taking up a note not yet due, who certainly enables another to deceive, if he does not provide that the note shall not be reissued. In Blake *v.* Sewell, 3 Mass. 556, Hemmenway *v.* Stone, 7 id. 58, Webster *v.* Lee, 5 id. 334, and Boylston *v.* Greene, 8 Mass. 465, the language is equally general, but the cases, like the first, did not call for the distinction. Beck *v.* Robley, 1 H. Bl. 89, note; Hull *v.* Pitfield, 1 Wils. 46. It seems to have been decided, and with good reason, that a premature release does not protect the releasee as against a subsequent *bona fide* holder, any more than a premature payment. Dod *v.* Edwards, 2 C. & P. 602.

(*y*) This seems to have been doubted in Baker *v.* Wheaton, 5 Mass. 509, cited in the preceding note. But see Byles on Bills, 177 and 180. Hansard *v.* Robinson, 7 B. & C. 90, 9 Dowl. & R. 860; Powell *v.* Roach, 6 Esp. 76; Alexander *v.* Strong, 9 M.

agent to receive payment deliver up a note or bill without payment.(z) Where there was a usage of trade, however, to deliver up a note on receipt of a check, an agent was considered justified in doing so, although the check itself was never paid.(a) But if other parties had a right to the production of a note of which payment is demanded, it would seem that they would be discharged (b) by the payee putting the note out of his hands.

If a stranger pays a bill, as one left at a banker's, for example and takes possession of the bill, this is not necessarily a payment by the acceptor,(c) but may be a purchase of the bill, which gives a right to demand its payment of those liable. In general, a bill is not discharged until paid by or in behalf of the acceptor, or a note until paid by the maker.(d)

& W. 733. It has been held, in Wain *v.* Bailey, 10 A. & E. 616, 2 Per. & Dav. 507, that, if the bill be not negotiable, the promisor cannot refuse to pay before the bill is given up to him.

(z) This used to be the strict rule. Marius, 21; Ward *v.* Evans, 12 Mod. 521; Vernon *v.* Boverie, 2 Show. 296.

(a) Russell *v.* Hankey, 6 T. R. 12. In this case a London banker received bills from a correspondent, to whom they had been indorsed, to present them for payment. The bills were given to the acceptor, who gave in payment a check upon a banker in London for the amount. The drawee of the check dishonored it, having no funds of or account with the drawer. The defendants contended that they had only done what was usual in the ordinary course of trade and business with bankers, of which opinion was Lord *Kenyon*, and also the whole court, who refused a rule to set aside the nonsuit. Byles on Bills, p. 16, says, that it is now doubtful if a London banker would be protected in taking checks for bills as payments, and it is believed by him *not* to be the custom.

(b) Powell *v.* Roach, 6 Esp. 76; Ridley *v.* Blackett, Peake's Ad. Cas. 62. So if the holder of a check receive bank-notes instead of cash, and the banker fail, the drawer is discharged. Vernon *v.* Boverie, 2 Show. 296.

(c) Deacon *v.* Stodhart, 2 Man. & G. 317. See also Jones *v.* Broadhurst, 9 C. B. 173. In Burr *v.* Smith, 21 Barb. 262, a note became due, and a stranger called for it on the holder and took it away, declining to have it cancelled. Nothing was said about buying the note. But this was held a payment and a bar to a suit by a person who received it from the stranger. The plaintiff in the case was not, however, a *bona fide* holder.

(d) In Eastman *v.* Plumer, 32 N. H. 238, the principal signer of a promissory note, when called on for payment brought the money, paid it over to the holder, who received it as and for payment, and gave up the note to the principal. The money belonged to a third party, who sent the principal debtor to purchase the note: and this third person bringing an action against a surety on the note, the latter was held not liable, the note as to him being paid. In Kemp *v.* Balls, 10 Exch. 607, 28 Eng. L. & Eq. 498, the defendant pleaded that he accepted a bill for the accommodation of the drawer; that there was no value or consideration for such acceptance, and that the drawer indorsed this bill and other bills to the plaintiff as security for the repayment

It is an ancient rule of law, that a part payment of a debt, the whole of which is due, cannot extinguish the debt, even where the parties agree that it shall.(*e*) The reason is, that the creditor's promise is without consideration. The rule itself is now much relaxed, and perhaps brought into some doubt. At all events, a very slight consideration suffices. If the payment is in any way more advantageous to the creditor than the contract requires it to be; as if it be made before it is due; or by a stranger; (*f*) or by a new bill or note for part, with a surety,(*g*)

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to the plaintiff of £ 30; and that, after action, the plaintiff's claim on the bill was satisfied and discharged by the payment to them by an acceptor of one of the other bills of the money so advanced. On demurrer, the plea was held bad, partly on the ground that the payment relied on was made by a stranger, and was not alleged to have been made for and on account of the debt, and to have been ratified by the defendant. See also Goodwin *v.* Cremer, 18 Q. B. 757, 16 Eng. L. & Eq. 90; Thame *v.* Boast, 12 Q. B. 808.

(*e*) Fitch *v.* Sutton, 5 East, 230, unless the demand be unliquidated; Wilkinson *v.* Byers, 1 A. & E. 106, 3 Nev. & M. 853; Watters *v.* Smith, 2 B. & Ad. 889; Beaumont *v.* Greathead, 2 C. B. 494. When a person is bound to pay a certain sum, there is no consideration, in the view of the law, for a promise that it shall be satisfaction if part is paid. Nor is it a consideration for a postponement of a portion of the debt. Price *v.* Cannon, 3 Misso. 453; Wheeler *v.* Wheeler, 11 Vt. 60. Of course a release under seal is a sufficient consideration. Part payment, if agreed to be in full, is made satisfaction by statute in some States. See Rev. Stat. of Maine. But see, with regard to the extinguishment of one simple contract by another, Com. Dig. Accord. B.; Good *v.* Cheesman, 2 B. & Ad. 328, 4 C. & P. 513; Cartwright *v.* Cooke, 3 B. & Ad. 701; Garrard *v.* Woolner, 8 Bing. 258. The substitution of one simple contract for another is the substitution of one cause of action for another.

(*f*) Welby *v.* Drake, 1 C. & P. 557. In this case the defendant was the drawer of a bill for £ 18 3*s.* 11*d.*, in satisfaction of which the plaintiff had taken £ 9 from the plaintiff's father, in satisfaction of the whole debt. The suit being brought by the plaintiff, *Abbott*, C. J. said: "If the father paid the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son, because by suing the son he commits a fraud on the father, whom he induced to advance the money, upon the faith of such advance being a discharge of his son from further liability."

(*g*) Hardman *v.* Bellhouse, 9 M. & W. 596, where a bill or note on which some other person than an original debtor is liable is expressly given and *accepted* in full satisfaction and discharge, the liability of the original debtor upon the original debt will not revive on the dishonor of the substituted instrument. Sard *v.* Rhodes, 1 M. & W. 153, Tyrw. & G. 298, 4 Dowl. 743, 1 Gale, 376. *Contra*, if taken on account or in renewal. Stedman *v.* Gooch, 1 Esp. 3; Kearslake *v.* Morgan, 5 T. R. 513. As a matter of pleading, if a note is given in satisfaction of a former one, and in satisfaction of that a third, this cannot be pleaded in satisfaction of the first. David *v.* Preece, 5 Q. B. 440. A bill of exchange or promissory note of the debtor, or of another party, is not payment of a precedent debt unless it be so agreed or understood by the parties. See in general, Tobey *v.* Barber, 5 Johns, 68; McGinn *v.* Holmes, 2 Watts, 121; Johnson *v.* Weed, 9 Johns. 310; Higgins *v.* Packard, 2 Hall, 547; Coxe *v.* Hankinson,

or perhaps a new bill or note that is negotiable, the former not being so.(*h*) So the bill of one person for the joint debt or note of both.(*i*) So the payment of the whole principal of a promissory note has been held to sustain an agreement that no interest should be demanded.(*j*) And, at present, we doubt whether any *bona fide* agreement by way of compromise, not in itself oppressive, would now be declared invalid by our courts.

If a drawer of a bill pay a part of it to a holder, the holder may still, as we should say, recover the whole amount from the acceptor; (*k*) but he recovers that part which has been paid to him only as trustee of the drawer.

Coxe, 85; Bill *v.* Porter, 9 Conn. 23; Sheehy *v.* Mandeville, 6 Cranch, 253; Chastain *v.* Johnson, 2 Bailey, 574; Porter *v.* Talcott, 1 Cowen, 359; Ayre *v.* Van Lieu, 2 South. 765; Sneed *v.* Wiester, 2 A. K. Marsh. 277; Davidson *v* Bridgeport, 8 Conn. 472; Gardner *v.* Gorham, 1 Doug. Mich. 507; Weed *v.* Snow, 3 McLean, 265; Hays *v.* Stone, 7 Hill, 128; Kelsey *v.* Rosborough, 2 Rich. 241; Steamboat Charlotte *v.* Hammond, 9 Misso. 58; Elwood *v.* Deifendorf, 5 Barb. 398. In some States (e. g. Maine, Vermont, and Massachusetts) the rule is, that such bill or note is *prima facie* payment, unless the contrary appears. Read *v.* Upton, 10 Pick. 522; Jones *v.* Kennedy, 11 id. 125; Wood *v.* Bodwell, 12 id. 268; Hutchins *v.* Olcutt, 4 Vt. 549, 555; Huse *v.* Alexander, 2 Met. 157; French *v.* Price, 24 Pick. 13. See also Trotter *v.* Crockett, 2 Porter, 401. It is a question of fact for a jury to determine the intention with which the security was given and accepted. Hart *v.* Boller, 15 S. & R. 162; Bullen *v.* McGillicuddy, 2 Dana, 90; Gardner *v.* Gorham, 1 Doug. Mich. 507. See chapter on Payment by Bill or Note, for a very full discussion and collection of the cases, and of the distinctions taken between cases in the various States of the Union.

(*h*) Sibree *v.* Tripp, 15 M. & W. 23, even if the debt be for a larger amount than the amount of the note.

(*i*) Thompson *v.* Percival, 5 B. & Ad. 925, 3 Nev. & M. 167. Taking a bill from one of two partners may be an advantage, and so be a consideration for abandoning a part of the sum due. The sole liability of one partner may be much more advantageous, it is said, than that of two or more. See chapter on Payment by Bill or Note.

(*j*) Beaumont *v.* Greathead, 15 Law J., C. P., 130, 3 Dowl. & L. 631, 2 C. B. 494.

(*k*) In Johnson *v* Kennion, 2 Wils. 262, it was held that the holder could recover from the acceptor the whole amount of the bill. This decision was approved in Walwyn *v.* St. Quintin, 1 B. & P. 652. However, only the difference between what was originally due and what was paid by the drawer was allowed to be recovered by the holder of the acceptor in Bacon *v.* Searles, 1 H. Bl. 88. Pierson *v.* Dunlop, 2 Cowp. 571. In this case, the mere arrest of the drawer was held no discharge of the acceptor. See Brown *v.* Rivers, 2 Doug. 472, which has, however, very little bearing upon the question before us, and only goes to show that an "action upon a note cannot be split." Reid *v.* Furnival, 1 Cromp. & M. 538, 5 C. & P. 499. In Hemming *v.* Brook, 1 Car. & M. 57, Lord *Abinger* ruled that the holder could only recover of the acceptor the amount of the bill, minus what had been paid by the drawer. But in Jones *v.* Broadhurst, 9 C. B. 173, it was held that the holder could recover the whole amount of the bill from the acceptor, and if he has been already paid in part by the drawer, he holds an equal sum to such payment in trust for such drawer. So if the drawer has paid the whole. Id.

Credit given by the party to a bill or note who is liable for its payment to the holder at his request, or if accepted by him, is equivalent to payment. But where a bill accepted for the accommodation of the drawer was sent to a bank for collection, and at its maturity the bank credited the holder with the amount, this is no payment which discharges the acceptor, for the bank acquires the holder's rights to the bill against the acceptor.(*l*)

If a banker takes from a customer a note with a surety, to secure a running balance, and gives credit on the faith of it, and afterwards general deposits or payments are made which equal or exceed the amount of the note, it still remains a security for the balance which may at any time exist.(*m*)

It may be regarded as established, that if a note be secured by a mortgage, and the mortgagor at its maturity give a new note, which is regarded by him and the mortgagee as a renewal of the old note, and even repeats this many times, each note that is given up is itself paid by the new one, and is a good consideration for the new one, but the original debt is not paid so as to discharge or affect the mortgage; nor will that be discharged unless by payment in money of the first note with interest, or

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See also Kemp *v.* Balls, 10 Exch. 607, 29 Eng. L. & Eq. 498; Goodwin *v.* Cremer, 18 Q. B. 757, 16 Eng. L. & Eq. 90. But in Lazarus *v.* Cowie, 3 Q. B. 459, a payment of the bill by a drawer was held a complete satisfaction. It has been said, and would seem to be favored by the reason of the thing, that, the drawer being security for the acceptor, the payment by the former would be, *pro tanto*, a discharge, and that, if payment in full were made, only nominal damages could be recovered against the acceptor. See Pothier, 106; Hemming *v.* Brook, 1 Car. & M. 57. Payment by a party who is a security upon negotiable paper may be considered in two ways, which perhaps accord with the original and reasonable intent of the parties. With regard to subsequent parties to a bill or note, a security's having paid the bill operates as satisfaction. So far as they are concerned the bill is extinct, *functum officio*. If this were the case with regard to prior parties, such a security, having paid the bill, would have no right of action against such prior parties *on the bill*, but only for money paid to the use of such prior party. This, however, is at variance with the every-day practice, which allows any indorser who has "taken up" or *paid* the paper (so far as subsequent parties are concerned), to erase all the names subsequent to and including his own, and proceed like an ordinary indorsee against prior parties. Callow *v.* Lawrence, 3 M. & S. 95. See Roberts *v.* Eden, 1 B. & P. 398; s. c. criticised by *Patteson*, J. in Bartrum *v.* Caddy, 9 A. & E. 275, 1 Per. & D. 207. See Pacific Bank *v.* Mitchell, 9 Met. 297.

(*l*) Pacific Bank *v.* Mitchell, 9 Met. 297.

(*m*) Pease *v.* Hirst, 10 B. & C. 122.

some other payment which the parties agree upon as satisfying the mortgage.(*n*)

As negotiable paper may be demanded and should be surrendered upon payment, the possession of it by one bound to pay it is in general presumptive proof that he has paid.(*o*) But the

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(*n*) See chapter on Payment by Note or Bill, for a full collection of authorities upon this subject.

(*o*) Hill *v.* Gayle, 1 Ala. 275; Dugan *v.* United States, 3 Wheat. 172; Baring *v.* Clark, 19 Pick. 220; Northampton Bank *v.* Pepoon, 11 Mass. 288; Green *v.* Jackson, 15 Maine, 136; Greenl. on Evid., § 33; Story on Notes, §§ 247, 452. In Dugan *v.* U. S., 3 Wheat. 172, this was so held, although there was a special indorsement by the indorser to a third person. In Baring *v.* Clark, 19 Pick. 220, the acceptor had possession of the bill, but it had been in circulation after acceptance. See Pfiel *v.* Vanbatenberg, 2 Camp. 439; Egg *v.* Barnett, 3 Esp. 196; Aubert *v.* Walsh, 4 Taunt. 293; 3 Stark Ev., 4th Am. ed., 1090, 1091; Gibbon *v.* Featherstonhaugh, 1 Stark. 225; Bell *v.* Norwood, 7 La. 95; Brembridge *v.* Osborne, 1 Stark. 374; Picquet *v.* Curtis, 1 Sumner, 478; Hughes *v.* Hind, 1 Wright, 650; Wilson *v.* Goodin, id. 219. In Dugan *v.* U. S., 3 Wheat. 172, Mr. Justice *Livingston*, delivering the opinion of the court, said: "After an examination of the cases on this subject, (which cannot all of them be reconciled,) the court is of opinion that, if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come in possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill or not, as he may think proper." 3 Kent's Com. 79; Mauran *v.* Lamb, 7 Cowen, 174; Dean *v.* Hewit, 5 Wend. 257. In Mendez *v.* Carreroon, 1 Ld. Raym. 742, per Ld. Ch. J. *Holt*, the plaintiff was indorsee, who had himself been sued. It was held, that he must prove that he had paid the party who sued him. There seemed to be a *quære* whether the plaintiff must not produce a receipt upon the protest. The case of Welch *v.* Lindo, 7 Cranch, 159, to the same effect, may be considered as overruled. This case, decided by *Marshall*, C. J., held that such an indorsee must have a reassignment or a receipt from the last or subsequent indorsees. These cases have led Mr. Justice *Story*, in his work on Promissory Notes, to say that "the production of a note, it is said, in the hands of a party either maker or indorser, is not evidence that it has been paid by him, but proof *aliunde* should be given; and hence the importance of a receipt upon the back of a note." See also Chitty on Bills, ch. 9, pp. 456, 457, 8th ed.; id., p. 429, 9th ed., Chitty and Hulme. But he hints at the adoption of the doctrine in our text by the United States and American courts generally. U. S. *v.* Barker, 1 Paine C. C. 156; Norris *v.* Badger, 6 Cowen, 449; Brinkley *v.* Going, 1 Breese, 288; Campbell *v.* Humphries, 2 Scam. 478, 479, and notes; Bank of U. S. *v.* U. S., 2 How. 711. All these cases follow the case of Dugan *v.* U. S., quoted *supra*. See also Mottram *v.* Mills, 1 Sandf. 37; Hunter *v.* Kibbe, 5 McLean, 279; Dollfus *v.* Frosch, 1 Denio, 367. In an action by drawer against acceptor of bill, if the plaintiff produce the bill with a general receipt upon the back, this was held to be *prima facie* evidence that the bill had been paid by the defendant, and not by the plaintiff. Scholey *v.* Walsby, Peake, Cas. 24; Jones *v.* Fort, 9 B. & C. 764. The presumption of payment arising from the

course of business may weaken or destroy this presumption. As, if a depositor at a bank is in the habit of sending to a bank checks drawn upon it, the mere possession of the check by the bank is not even *prima facie* evidence that the check was paid by them.(*p*)

So the possession of a bill by an acceptor is not evidence of payment by him, unless it can be shown that, after he received it for acceptance, it passed from his hands into circulation. Then, if he received it again, the presumption is that he acquired it by payment.(*q*) And if a bill or check be sent to the drawee to be passed to the credit of the sender, and is so credited, the bill is discharged, and can no longer be negotiated.(*r*)

If there be a general receipt of payment on the back of a note or bill, as the maker or acceptor is primarily the person to pay, the presumption will be that the payment was made by him; (*s*) and since the holder has the custody of the negotiable paper, receipts on the back of such negotiable paper are presumptive evidence of payment; but it is for a jury to decide if this was done to take the bill out of the Statute of Limitations.(*t*) These presumptions are of course open to rebutter.

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possession of the note by the party liable to pay, may be rebutted certainly. Fellows *v.* Kress, 5 Blackf. 536.

(*p*) See chapter on Checks, where the authorities are collected.

(*q*) Pfiel *v.* Vanbatenberg, 2 Camp. 439. See also cases in note *o*.

(*r*) Savage *v.* Merle, 5 Pick. 83. In this somewhat peculiar case the circumstances were as follows. The defendant, John A. Merle, drew a bill of exchange on W. & N. Wyer, of New Orleans, in favor of the plaintiff. The plaintiff sent the bill directed to "Wyer & Merle," directing them to pass it to the credit of the plaintiff. At the time the bill was drawn no such firm as "Wyer & Merle" existed; but Wyer, the survivor of the firm of W. & N. Wyer, and John A. Merle, the defendant, had made arrangements to go into partnership, and had issued circulars intimating such intention. The bill was passed to the credit of the plaintiff in the books of W. & N. Wyer. The receipt of the letter was acknowledged by W. & N. Wyer, who say the bill has been accepted and will meet with due honor. The contemplated partnership never went into operation. There was no presentment of the bill to the drawee for acceptance or payment other than sending of the bill itself to him, and no protest or notice was sent to the drawer. Held, that the defendant was not liable as drawer, nor as the plaintiff's agent, and so liable for negligence.

(*s*) Scholey *v.* Walsby, Peake's Cas. 24.

(*t*) Gibson *v.* Peebles, 2 McCord, 418. But where the receipts were such as might take the bill or note out of the Statute of Limitations, such receipts in the handwriting of the holder would be of very slight weight, as they could hardly be then considered as admissions against interest. Perhaps all the writing in the case is to be presumed to have been made at the time at which it bears date. If such receipts were in the hand-

SECTION III.

OF APPROPRIATION OF PAYMENT.

If a debtor who owes on sundry accounts makes a general payment, the question may arise as to which account it shall be credited; he may owe on book account and on note, and does this payment settle the note? or he may owe notes some of which are secured and others not, and which of these notes are paid? The law of appropriation presents in this way questions of some difficulty.(*u*)

The general rules are, first, that the party paying can appropriate his payments as he chooses,(*v*) but he should indicate to the payee his application of the payment at or before the time of payment.(*w*) He is not, however, allowed so to appropriate

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writing of the defendant, who sets up the Statute of Limitations, of course they would be good evidence of such payment. But if the writing is in the hand of the plaintiff, it may, at least, be said to be a species of evidence which the holder has it in his power at any time to create. Perhaps the actual payment should be shown, or at least that such writing was on the note before the statute had run its course. This question has been thought worthy of special statutes in some of the States, as, for example, in Massachusetts.

(*u*) The whole law on the subject of the application, or, as it is sometimes called, the imputation of payments, was learnedly discussed and fully expounded in Clayton's case, in Devaynes *v.* Noble, 1 Meriv. 572.

(*v*) That in the case of voluntary payments, and not those made by process of law (Blackstone Bank *v.* Hill, 10 Pick. 129), the debtor may apply the payments as he pleases, is held in the following cases. Tayloe *v.* Sandiford, 7 Wheat. 13; Reed *v.* Boardman, 20 Pick. 441; Martin *v.* Draher, 5 Watts, 544; M'Donald *r.* Pickett, 2 Bailey, 617; Mitchell *v.* Dall, 4 Gill & J. 361; Selfridge *v.* Northampton Bank, 8 Watts & S. 320; Runyon *v.* Latham, 5 Ired. 551; Howland *v.* Rench, 7 Blackf. 236; Rackley *v.* Pearce, 1 Ga. 241; Randall *v.* Parramore, 1 Fla. 409; United States *v.* Bradbury, Davcis, 146.

(*w*) Reynolds *v.* M'Farlane, 1 Overt. 488; Moss *v.* Adams, 4 Ired. Eq. 42. The parties need not declare how the money is to be appropriated; it will suffice if such direction or appropriation can be implied from any circumstances. Robert *v.* Garnie, 3 Caines, 14; Brett *v.* Marsh, 1 Vern. 468; Shaw *v.* Picton, 4 B. & C. 715, 7 Dowl. & R. 201; Chitty *v.* Naish, 2 Dowl. 511; Mitchell *v.* Dall, 2 Harris & G. 159, 4 G. & J. 361; Marryatts *v.* White, 2 Stark. 101; Peters *v.* Anderson, 5 Taunt. 597; Taylor *v.* Rymer, 3 B. & Ad. 333; Scott *v.* Fisher, 4 T. B. Mon. 387. If such intention on the part of the debtor appear, the creditor is bound thereby. Reed *v.* Boardman, 20 Pick. 441; Hall *v.* Marston, 17 Mass. 575; Gilchrist *v.* Ward, 4 Mass. 692; Bonuffe *v.* Woodberry, 12 Pick. 463; Hussey *v.* Manuf. & Mechanics Bank, 10 Pick. 415; Bosley *r.* Porter, 4 J. J. Marsh. 621; Hall *r.* Constant, 2 Hall, 185; M'Donald *v.* Pickett, 2 Bailey, 617; Martin *v.* Draher, 5 Watts, 544;

payment as to affect the relative rights of his sureties,(*x*) but in some cases he seems to be permitted to exercise his option, to the injury of a surety of one of the debts.(*y*)

The question of the time within which the creditor may make his appropriation has been much discussed, and the authorities

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Boutwell *v.* Mason, 12 Vt. 608; Pindall *v.* Bank of Marietta, 10 Leigh, 481; Miller *v.* Trevilian, 2 Rob. Va. 1, 27; Mills *v.* Fowkes, 7 Scott, 444; Black *v.* Schooler, 2 McCord, 293. Though the creditor at the time, and constantly afterwards, refuse to make the application directed or requested, if he receive the money he is bound by the application made by the debtor. Reed *v.* Boardman, 20 Pick. 441. The fact that a debtor denied owing one of the debts is evidence of intention to have the payment applied to another; so the correspondence of the sum paid with one of the debts affords a presumption that it was intended to cancel that debt. Tayloe *v.* Sandiford, 7 Wheat. 13, 20; Mitchell *v.* Dall, 2 Harris & G. 159, 160, 173, 4 Gill & J. 361; Robert *v.* Garnic, 3 Caines, 14; West Branch Bank *v.* Moorehead, 5 Watts & S. 542; Scott *v.* Fisher, 4 T. B. Mon. 387; Stone *v.* Seymour, 15 Wend. 19. In this case the following rules are laid down, which may be said to be universally received, both among the civilians and in courts of common law. 1st. If both debts are due at the time of a partial payment, the debtor is at liberty to apply the payment to which he pleases, if his intention is manifested at the time of payment; subject to this restriction, however, that the creditor is not obliged to receive a partial payment of any particular debt of which the whole is due at the time the offer of payment is made. 2d. When the debtor neglects to manifest his intention as to the application of the payment at the time it is made, the creditor may at the time he receives the money apply it to which debt he pleases, unless the debtor objects; the creditor manifesting his intention at the time, either in the acquittance which he gives or in some other way. 3d. If a partial payment is made on account of debts, one part of which debts consists of the principal, and another of the interest or compensation due for the use of capital, of such debts so much of the payment as is necessary to satisfy the interest or arrears then due shall be first applied for that purpose, and the residue only shall go to reduce the amount of the principal debt. These rules prevailed in the Roman or civil law, and are now the settled law of France, Spain, Holland, Scotland, England, and the United States. 1 Domat, B. 4, tit. 1, § 4, Art. 1, 3, 5, 6; Nap. Code, Art. 1253, 1254, 1255; 5 Partidas, tit. 14, Law 10; Van Der Linden's Inst. of Holland, B 1, ch. 18, § 1, Henry's Transl. 267; Bell's Law of Scot., Art. 562, p. 135; 2 Bell, Com. 535; Wood's Civ. Law, 293; 1 Evans, Poth. 328, No. 528; Anonymous, Cro. Eliz. 68; Bois *v.* Cranfield, Style, 239; Haynes *v.* Harrison, 1 Ch. Cas. 105; Crisp *v.* Black, Finch, 89; Field *v.* Holland, 6 Cranch, 27; Taylor *v.* Talbot, 2 J. J. Marsh. 49; Baker *v.* Stackpoole, 9 Cowen, 420; Civ. Code of Louis., Art. 2159, 2160, 2161; Hart *v.* Dewey, 2 Paige, 207. See also Williams *v.* Houghtaling, 3 Cowen, 88; Tracy *v.* Wikoff, 1 Dall. 124. In Hall *v.* Marston, 17 Mass. 575, it was held that when a creditor receives from his debtor a bill of exchange, with directions to pay a part of it to another creditor, he has no right to appropriate the whole sum collected to the payment of his own debt. It may be a question whether the debtor could complain; but there is no doubt that the creditor to whom a portion was to be paid could maintain an action for money had and received.

(*x*) Postmaster-General *v.* Norvell, Gilpin, 106; Merrimack Co. Bank *v.* Brown, 12 N. H. 320; Myers *v.* United States, 1 McLean, 493.

(*y*) See, on the rights of a surety, Kirby *v.* Marlborough, 2 Maule & S. 18; Postmaster-General *v.* Furber, 4 Mason, 333.

are far from uniform. Perhaps the general rule may be stated thus: As between the debtor and creditor, it may be made at any time before a suit is brought, or an actual controversy begun. But in regard to third parties, whom a delay might affect, it must be made within reasonable time.(*z*) The creditor cannot change an application which he has once made.(*a*)

Secondly, if he can exercise this choice, but does not, the payee may make this appropriation,(*b*) provided it be such an application as the debtor could not reasonably and justly object to.

(*z*) Mayor of Alexandria *v.* Patten, 4 Cranch, 317; Pattison *v.* Hull, 9 Cowen, 747; Bosanquet *v.* Wray, 6 Taunt. 597; Frazer *v.* Bunn, 8 C. & P. 704; United States *v.* Kirkpatrick, 9 Wheat. 720, 737. See also Philpott *v.* Jones, 2 A. & E. 41; Williams *v.* Griffith, 5 M. & W. 300; Brady *v.* Hill, 1 Misso. 315; Hilton *v.* Burley, 2 N. H. 193; Heilbron *v.* Bissell, 1 Bailey, Eq. 430; Starrett *v.* Barber, 20 Maine, 457. Whether the application can be made by the creditor after suit brought is discussed in Wilkinson *v.* Sterne, 9 Mod. 427; Bosanquet *v.* Wray, 6 Taunt. 597; Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Mayor of Alexandria *v.* Patten, 4 Cranch, 317; Brady *v.* Hill, 1 Misso. 315; Heilbron *v.* Bissell, 1 Bailey, Eq 430. In Mayor of Alexandria *v.* Patten, 4 Cranch, 317, *Marshall*, C. J. stated the whole law on the subject of application of payment so clearly and in so few words that we quote them at length. "It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or simple contract. Unquestionably circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and therefore the court was correct in instructing the jury that, if they should be satisfied that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the plaintiff if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, that court erred."

(*a*) Hill *v.* Southerland, 1 Wash. Va. 128; White *v.* Trumbull, 3 Green, N. J. 314; Hilton *v.* Burley, 2 N. H. 123.

(*b*) Smith *v.* Screven, 1 McCord, 368; Blinn *v.* Chester, 5 Day, 166. The rule which the Continental law adopts from the Roman law is, that the intention of the party making the payment should govern. The words of the Digest are: "Quotiens quis debitor ex pluribus causis unum debitum solvit: est in arbitrio solventis dicere, quod potius debitum voluerit solutum; et quod dixerit id erit solutum." Dig. 46, 3, 1; Cod. 8, 43, 1. "Quotiens vero non dicimus id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat." Id. This indicates the power of election in the payee, but that such election should be indicated to the payor appears from the same and following passages: "Dum in re agenda (in re presenti, hoc est statim atque solutum est) hoc fiat; ut vel creditori liberum sit, non accipere, vel debitori non dare, si alio nomine ex solutum quis eorum velit. Cæterum postea non permittitur." But if there be no appropriation by the debtor, the creditor at common law, where there are several distinct debts, has a right of appropriation any time before action. Simson *v.* Ingham, 2 B. & C. 65,

The limitation imposed by this last requirement is hardly capable of exact definition; but the reason for it is obvious. The debtor has an undoubted right to apply his payments. But if he abstains from exercising this right, and is only silent, it cannot be supposed that he intends, by his silence, to subject himself to an injury. Nor can the creditor reasonably allege that the debtor was under any obligation to make an express application of the payment, and, by not doing it, gave the creditor a right to inflict upon him injury. The only fair inference, and, as we appre-

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3 Dowl. & R. 249; Philpott *v.* Jones, 2 A. & E. 41. The following cases hold that, in case of distinct debts, the creditor may exercise his option. Clayton's Case, 1 Meriv. 572, 604; Bodenham *v.* Purchas, 2 B. & Ald. 39; Kirby *v.* Marlborough, 2 M. & S. 18; Peters *v.* Anderson, 5 Taunt. 596; Mayor of Alexandria *v.* Patten, 4 Cranch, 317; Rackley *v.* Pearce, 1 Ga. 241; Brewer *v.* Knapp, 1 Pick. 332; Washington Bank *v.* Prescott, 20 Pick. 339; Blackstone Bank *v.* Hill, 10 Pick. 129; Mann *v.* Marsh, 2 Caines, 99; Mitchell *v.* Dall, 4 Gill & J. 361, 2 Harris & G. 159; Arnold *v.* Johnson, 1 Scam. 196; Brady *v.* Hill, 1 Misso. 315; Blinn *v.* Chester, 5 Day, 166; Logan *v.* Mason, 6 Watts & S. 9; Rosseau *v.* Cull, 14 Vt. 83; Selleck *v.* Sugar-Hollow Turnpike Co., 13 Conn. 453; Allen *v.* Kimball, 23 Pick. 473; Jones *v.* United States, 7 How. 681; Cremer *v.* Higginson, 1 Mason, 338; Van Rensselaer *v.* Roberts, 5 Denio, 470; Sawyer *v.* Tappan, 14 N. H. 352; United States *v.* Wardwell, 5 Mason, 82. For the mode in which application made by the creditor may be proved and fixed, see Starrett *v.* Barber, 20 Maine, 457; Allen *v.* Kimball, 23 Pick. 473; Lindsey *v.* Stevens, 5 Dana, 104. Campbell *v.* Hodgson, Gow, N. P. 74; Hall *v.* Wood, 14 East, 243, note; Neale *v.* Reid, 1 B. & C. 657, 3 Dowl. & R. 158. In this case A sold goods to B, to whom and at whose risk they were shipped to Lisbon. They were to be paid for by bills on R. & Co. C, the supercargo, was A's agent, and was to retain possession of the goods until the amount of the bills on R. & Co. was remitted, and then the bill of lading was to be given up to B. R. & Co., by B.'s order, effected insurance. The ship was captured, and R. & Co. received the proceeds, and gave credit for a part thereof to B, and paid a portion to his assignees in bankruptcy. The bills drawn by B in favor of A were paid in part, and in part rejected. A brought an action for money had and received for his use. It was held that they were not obliged to apply the proceeds of the policy to the payment of the bills for the goods. In Woodroffe *v.* Hayne, 1 C. & P. 600, accommodation acceptances were given by A to B, and passed by B to C to secure some acceptances of his, which were paid by B out of the produce of other acceptances of C. A's acceptance was not given up, though C was desired not to present it, and A was informed that it would not be presented. The original transaction was held to be continued. The fact A did not call for the bill, was held to constitute a presumption that he allowed it to remain in the hands of C as security for acceptances given subsequently to those for which it was first given. See Atwood *v.* Crowdie, 1 Stark. 483. The doctrine of the exercise of the creditor's option applies where one of the debts is due on a specialty. Manning *v.* Westerne, 2 Vern. 606; Peters *v.* Anderson, 5 Taunt. 596. So where there are a judgment and a simple contract debt. Brazier *v.* Bryant, 2 Dowl. 477; Chitty *v.* Naish, id. 511. Or where there is a prior debt which is merely equitable. Bosanquet *v.* Wray, 6 Taunt. 597, 2 Marsh. 319. It is said that a general payment must be applied, if not appropriated by the creditor, to a prior legal and not to a subsequent equitable demand.

hend, the only legal inference, from the silence of the debtor, is that he is willing the creditor should make any application of the money which is advantageous to him, and at the same time not injurious to the creditor.(*c*) When the payee has once made an election, he cannot change it.(*d*) This privilege of the payee only applies to voluntary payments,(*e*) and where several notes are

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Goddard *v.* Hodges, 1 Cromp. & M. 33, 3 Tyrw. 209. Although one of two debts was secured only by an unstamped bill, it was held that the holder might apply a payment to that in preference to a bill duly stamped. Biggs *v.* Dwight, 1 Man. & R. 308. B was the holder and A the acceptor of two bills, both overdue, the one unstamped for £ 25, the latter stamped for £ 50. The acceptor paid £ 22 10*s.* to B, the holder, "on account." B said he wished to have the full amount of the £ 25 bill. A replied, that he had no more then, but would pay some more soon. B then indorsed the £ 25 bill, Received £ 22 10*s.*, in part of two bills. It was allowed B to appropriate this payment to the unstamped bill. So, although one of two debts has been barred by the Statute of Limitations, the creditor is at liberty to appropriate a general payment to the discharge of a debt so barred. Mills *v.* Fowkes, 5 Bing. N. C. 455, 7 Scott, 444. In this case *Tindal*, C. J. said, the rule of the civil law, that a general payment is to be applied to a more burdensome debt, is unknown to our law. It is said, and with good reason, that application of payment cannot be made after a controversy has arisen, or after an action has been brought. In U. S. *v.* Kirkpatrick, 9 Wheat. 737, *Story*, J., delivering the opinion of the court, said: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it. If both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time, so that the credits are to be deemed payments *pro tanto* of the debts antecedently due. Robinson *v* Doolittle, 12 Vt. 246; Fairchild *v.* Holly, 10 Conn. 176.

(*c*) Ayer *v.* Hawkins, 19 Vt. 26; Cowperthwaite *v.* Sheffield, 1 Sandf. 416; Parchman *v.* McKinney, 12 Smedes & M. 631; Bancroft *v.* Dumas, 21 Vt. 456; Caldwell *v.* Wentworth, 14 N. H. 431.

(*d*) Hill *v.* Southerland, 1 Wash. Va. 128; White *v.* Trumbull, 3 Green, N. J. 314; Hilton *v.* Burley, 2 N. H. 103. When an account was delivered by an agent in which he charges himself with a balance, and then continues to receive moneys for his principal, subsequent payments made by the agent are not necessarily applied to cancelling the previous balance, when subsequent receipts are equal to subsequent payments. Lysaght *v.* Walker, 5 Bligh, N. S. 1; Taylor *v.* Kymer, 3 B. & Ad. 320. When the consignor of goods appropriates the proceeds, he may alter the appropriation any time before the goods or a notice of the former appropriation have reached the creditor. Hankey *v.* Hunter, Peake, Ad. Cas. 107, per Lord *Kenyon*. When the creditor has rendered an account of the application of a payment to various debts, he cannot elect to vary such election, so as to affect the rights of third persons. Bank of North America *v.* Meredith, 2 Wash. C. C. 47.

(*e*) Blackstone Bank *v.* Hill, 10 Pick. 129.

joined in a suit, and execution satisfied in part, the surety of one of the notes has a right to demand a proportional appropriation. If a debtor makes a payment without appropriation, the creditor cannot apply it to debts not then due and payable, if there be other debts then due and payable.(*f*)

Thirdly, if neither party appropriates the payment at the time, the law will do it.(*g*) And in making this appropriation the law will regard the probable intention of the parties and the justice and merits of the case.(*h*) Among the most general rules of

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(*f*) Bacon *v.* Brown, 1 Bibb, 334; McDowell *v.* Blackstone Canal Co., 5 Mason, 11; Seymour *v.* Sexton, 10 Watts, 255.

(*g*) See preceding note on this subject. But in Philpott *v.* Jones, 2 A. & E. 41, *Taunton*, J. said, that the appropriation might be made by the creditor any time before the case came to be considered by the jury. The application of a payment by law would seem to be of little benefit to the debtor. In Peters *v.* Anderson, 5 Taunt. 596, it seems that the action is sufficient, and sufficiently early notice of the appropriation made by the creditor.

(*h*) Postmaster-General *v.* Norvell, Gilpin, 106; Harker *v.* Conrad, 12 S. & R. 301; United States *v.* Kirkpatriek, 9 Wheat. 720; Cremer *v.* Higginson, 1 Mason, 323; Gwinn *v.* Whitaker, 1 Harris & J. 754; Briggs *v.* Williams, 2 Vt. 283; Robinson *v.* Doolittle, 12 Vt. 246; Randall *v.* Parramore, 1 Fla. 409; Bayley *v.* Wynkoop, 5 Gilman, 449. The probable intention of the debtor, the creditor having made no appropriation, seems to control. Hilton *v.* Burley, 2 N. H. 193; Dorsey *v.* Gassaway, 2 Harris & J. 402; Dedham Bank *v.* Chickering, 4 Pick. 314; United States *v.* Bradbury, Daveis, 146. And it will be presumed that he meant to extinguish those debts which were most burdensome, — those which bear interest rather than those which do not, — debts secured by a penalty, including such debts as may be used to declare the debtor bankrupt. But if all debts are alike in other respects, the payment will be appropriated according to their priority in time, and it was the rule, that, if all were alike in *every* respect, the payment would be applied ratably to their reduction. Dig. 46, 3; Favenc *v.* Bennett, 11 East, 36. But the intention of the debtor must be compatible with an honest intention to discharge all the debts at some time. Otherwise, if upon a series of debts payment were made, it would certainly be for the debtor's interest to have payment made to the last in point of time, and so have the benefit of the Statute of Limitations as to those which were earlier. So the debtor, if dishonest, would prefer to cancel a debt which was secured; but the law makes appropriation of payment first to such debts as are not secured. But still the law will appropriate a payment so as to relieve a surety for another, when left to operate of itself. But see Mills *v.* Fowkes, 5 Bing. N. C. 455 – 457, 7 Scott, 444, where *Tindal*, C. J. denies that the application of a general payment to the more burdensome debt is known to the common law; and also Stone *v.* Seymour, 15 Wend. 29, in which the principle of applying the money to the debt most burdensome to the debtor, as was the Roman and civil law rule, — 1 Domat, 6, 4, tit. 1, § 4, art. 2, 3, — is criticised, as overlooking the fact, that, where there are conflicting interests, the golden rule applied as well to the debtor as to the creditor. Field *v.* Holland, 6 Cranch, 27. See Bell's Law Dict., Art. *Indefinite Payment*. Heyward *v.* Lomax, 1 Vern. 24, allows the application to be made by law to the most burdensome debt, — as, in that case, to paying off a mortgage drawing interest, rather than an account not secured,

application are these, that interest is to be paid first,(*i*) and then the principal; and that application of payment is to be made to those debts which are prior in date.(*j*) The appropriation by either party should be indicated in some way to the other; as, if he makes an entry in his books, he should show it to the other party.(*k*) And if one of the debts be secured, and others not, the law (in the absence of appropriation by the parties) will apply the payment first to the unsecured debts,(*l*) unless the others are secured by a surety, and then, in general, the appropriation will be made to benefit and relieve

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and on which no interest was payable. This seems to look to the ultimate intention of the debtor not to pay all the debts. Wilkinson *v.* Sterne, 9 Mod. 427, per Lord *Hardwicke*. To the same effect is Bacon *v.* Brown, 1 Bibb, 334; Anonymous, Comb. 463, per Lord *Holt*. In Manning *v.* Westerne, 2 Vern. 607, the application was ruled to be proper which was most beneficial to the creditor, which is the reverse of the rule stated above. Blanton *v.* Rice, 5 T. B. Mon. 253, applied the payment to the debts which were most precarious; but in Stone *v.* Seymour, 15 Wend. 40, Senator *Tracy* states that the course of decisions has been to reverse the civil law rule of application to the most burdensome debts. Goddard *v.* Cox, 2 Stra. 1194; Newmarch *v.* Clay, 14 East, 239; Peters *v.* Anderson, 5 Taunt. 596; Jones *v.* Kilgore, 2 Rich. Eq. 63; Briggs *v.* Williams, 2 Vt. 283; Capen *v.* Alden, 5 Met. 268; Blanton *v.* Rice, 5 T. B. Mon. 253; Planters' Bank *v.* Stockman, 1 Freem. Ch. 502; Field *v.* Holland, 6 Cranch, 8; Hammer *v.* Rochester, 2 J. J. Marsh. 14. See, however, in support of civil law rule, Meggot *v.* Mills, 1 Ld. Raym. 288; Dawe *v.* Holdsworth, Peake, N. P. 64; Robert *v.* Garnie, 3 Caines, 14. For a general statement of the rules by which courts will be governed when the application devolves upon them, see Emery *v.* Tichout, 13 Vt. 15, 17; Stamford Bank *v.* Benedict, 15 Conn. 437; Portland Bank *v.* Brown, 22 Maine, 295; Smith *v.* Loyd, 11 Leigh, 512; Heilbron *v.* Bissell, 1 Bail. Eq. 435; Bosanquet *v.* Wray, 6 Taunt. 597.

(*i*) Gwinn *v.* Whitaker, 1 Harris & J. 754; Frazier *v.* Hyland, id. 98; Peebles *v.* Gee, 1 Dev. 341; Spires *v.* Hamot, 8 Watts & S. 17; De Bruhl *v.* Neuffer, 1 Strobh. 426; Bond *v.* Jones, 8 Smedes & M. 368; Righter *v.* Stall, 3 Sandf. Ch. 608; Jenks *v.* Alexander, 11 Paige, 619; Hart *v.* Dorman, 2 Fla. 445.

(*j*) Allstan *v.* Contee, 4 Harris & J. 351; United States *v.* Kirkpatrick, 9 Wheat. 720; Fairchild *v.* Holly, 10 Conn. 175; Postmaster-General *v.* Furber, 4 Mason, 333; McKenzie *v.* Nevius, 22 Maine, 138; Berghaus *v* Alter, 9 Watts, 386; Boody *v.* United States, 1 Woodb. & M. 150; Upham *v.* Lefavour, 11 Met 174; United States *v.* Bradbury, Daveis, 146; Caldwell *v.* Wentworth, 14 N. H. 431.

(*k*) Simson *v.* Ingham, 2 B. & C. 65, 3 Dowl. & R. 249. See note *w*, *supra*, p. 222.

(*l*) In Birch *v.* Tebbutt, 2 Stark. 74, A had a legal claim against B, as the acceptor of a bill of exchange; he had also possession of a certain mortgage deed from B to a third person, of which he was able to compel an assignment in equity to himself. B paid money to A, without prejudice to his claim on any securities, and the law applied the payment to the bill of exchange. Moss *v.* Adams, 4 Ired. Eq. 42; Jones *v.* Kilgore, 2 Rich. Eq. 63; Baine *v.* Williams, 10 Smedes & M. 113. Gwinn *v.* Whitaker, 1 Harris & J. 754, conflicts with the doctrine in the text, and favors the creditor: also, Dorsey *v.* Gassaway, 2 Harris & J. 402.

the surety.(*m*) If there be no reason to the contrary, the law will apply the money to a debt which is more burdensome to the debtor, rather than to one less so ; (*n*) as to one bearing interest, or having a penalty annexed, rather than to one without.(*o*) If a partner, who owes personally one who is also a creditor of the firm, pays the money of the firm, the law will appropriate it to the notes of the firm ; (*p*) and, by parity of reason, if he pays his own money, the law should appropriate it to his personal notes.(*q*)

(*m*) Marryatts *v.* White, 2 Stark. 101. A promissory note was given by a surety for goods, to be supplied to his principal, and not in respect of a previous debt. Goods were subsequently supplied, and from time to time payments were made by the principal, on some of which, for his promptness, discounts were made. The court held, in favor of the surety, that all these payments were intended in liquidation of the latter account.

(*n*) *Supra*, p. 227, note *h*.

(*o*) Meggot *v.* Mills, 1 Ld. Raym. 286 ; Dawe *v.* Holdsworth, Peake, 64 ; and observations in Peters *v.* Anderson, 5 Taunt. 596. In Meggot *v.* Mills, *Holt*, C. J. said, and was not contradicted by the other judges, that if a debtor owe a debt, contracted while a trader within the bankrupt act, and another debt contracted afterwards, a payment will be applied by law to the debt upon which a commission of bankruptcy could be taken out. It is said by Chitty, 8th ed., 403, that it should be noticed that bankruptcy was criminal.

(*p*) Thompson *v.* Brown, Moody & M. 40. In this case a partner was liable before the partnership, and was also liable on a copartnership debt. The creditor received money paid generally, but as the money so paid was partnership property, it was held that it could only be applied to a partnership debt. But in Smith *v.* Wigley, 3 Moore & S. 174, A and B were partners, and became indebted to C. B, after dissolution of the partnership, became personally indebted to C, and then made general payment. It was held, that these payments should be applied to the reduction of the earlier items, in the absence of any particular appropriation. It is frequently the case that one partnership is dissolved and a new one formed by the admission of new parties. A party continues dealing with the new firm, and the same accounts are continued. The old firm, it seems, is not thereby discharged. Gough *v.* Davies, 4 Price, 200. If such a party makes payments, they should be carried by the new firm to the old account. Strange *v.* Lee, 3 East, 484 ; Bodenham *v.* Purchas, 2 B. & Ald. 39 ; Newmarch *v.* Clay, 14 East, 239 ; Fairchild *v.* Holly, 10 Conn. 175.

(*q*) Fairchild *v.* Holly, 10 Conn. 175, a leading case, sustains the principles laid down in the text. In this case there was an account against a copartnership, entire and unbalanced, upon which, however, sundry payments from time to time had been made. There was a secret partner in the firm, who had withdrawn before any payment had been made. One of the remaining partners made the payment. These payments, it was held, could not be presumed to have been made with money accruing out of the funds of the new firm. That it was to be applied to the benefit of the fund out of which it had accrued, and that it could not be applied to the portion of the account subsequent to the withdrawal, on the principle that it should be applied to that which was the least secure ; that the money should be applied to the oldest items in regular order. It did not appear but that the old and new firm were equally solvent, — if it is possible to add a member to a partnership without adding to its available means.

If the creditor have demands personally, and also officially, as executor, for example, he may appropriate a general payment first to his personal debt.(*r*) If the several items of debt are continuous and connected as parts of one account, and notes were given, from time to time, as the debts successively became definite, the rule is, that money paid must be applied to the earliest first,(*s*) and the earliest part of one entire account is considered to be cancelled first.(*t*) And no appropriation will be

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In Sneed *v.* Wiester, 2 A. K. Marsh. 277, after the dissolution of a copartnership, one partner continued to deal with a former creditor and made payments; it was held that such payment might be applied to the individual debt. But we think this properly a question of fact for the jury, and depending upon which was the owner of the money. Fowke *v.* Bowie, 4 Harris & J. 566.

(*r*) It is a general rule, that, when an agent is employed to receive money for his principal, he cannot appropriate such money to a debt due himself from the principal, unless the principal consents. Morse *v.* Woods, 5 N. H. 297. But if both as agent and principal one has claims on another, an unappropriated payment must be applied to both debts ratably. Barrett *v.* Lewis, 2 Pick. 123; Cole *v.* Trull, 9 id. 325. When one, however, owes in personal and official capacity, it seems to be law and sense that the jury are to decide for which the payment is made. Fowke *v.* Bowie, 4 Harris & J. 566. Here debts were due from A personally, and as an administrator.

(*s*) See *supra*, p. 227, note *h*.

(*t*) Clayton's Case, 1 Meriv. 585, 608; per *Bayley*, J., in Bodenham *v.* Purchas, 2 B. & Ald. 39, 45. See 2 Bridg. Index, 586, 2d ed., tit. *Trade;* Harrison's Index, Vols. II. and III. pp. 893, 897, 2442, 3d ed., tit. *Debtor and Creditor.;* Kilsby *v.* Williams, 5 B. & Ald. 815; U. S. *v.* Kirkpatrick, 9 Wheat. 720; Postmaster-General *v.* Furber, 4 Mason, 333; Baker *v.* Stackpoole, 9 Cowen, 420; Pemberton *v.* Oakes, 4 Russ. 154; Smith *v.* Wigley, 3 Moore & S. 174; Gass *v.* Stinson, 3 Sumner, 98; McKenzie *v.* Nevius, 22 Maine, 138; Miller *v.* Miller, 23 id. 22; Fairchild *v.* Holly, 10 Conn. 175; Smith *v.* Loyd, 11 Leigh, 512. See Logan *v.* Mason, 6 Watts & S. 9; Capen *v.* Alden, 5 Met. 272. If several notes are joined in one suit, and the execution recovered in such suit is satisfied only in part, a surety who is such on part of the notes only may insist on a proportional application of the money. Blackstone Bank *v.* Hill, 10 Pick. 129; Marsh *v.* Houlditch, Sittings at Westminster after Easter Term, 1810, before Mr. Justice Abbott, Chitty on Bills, 9th ed. 404. The plaintiffs who sued upon the bill were nonsuited upon the following state of facts. The plaintiffs discounted a bill, accepted by the defendant for the accommodation of the drawer, who, when informed of the dishonor, requested the plaintiffs not to apply to the acceptor. Afterwards, the balance with the bankers came to be in favor of the drawer of the bill, and it was regarded as satisfied, although the drawer failed and became insolvent, with a large balance unpaid with the bankers. Bloxsome *v.* Neale, K. B. 1832, Chitty on Bills, 9th ed. 219; Hammersley *v.* Knowlys, 2 Esp. 665; Dawe *v.* Holdsworth, Peake, 64. But see Tinson *v.* Francis, 1 Camp. 19; Atwood *v.* Crowdie, 1 Stark. 483; Bosanquet *v.* Dudman, id. 1. In Hammersley *v.* Knowlys, 2 Esp. 665, a person who had cash on deposit with a banker left with him a note of a third person for a sum of money, telling him that it was made for his accommodation, and afterwards paid a sum of money into the bank without making any specific appropriation of it. It was held that this money must be applied, as far as it would go, to the discharge of the then existing debt, and

allowed which has the effect of paying one man's debt with another man's money.(*u*) And there can be no appropriation which will deprive a debtor of a benefit to which he is entitled, as, for example, the taxation of costs.(*v*)

It has been held, that, if one of two debts be barred by the Statute of Limitations, a creditor is still at liberty to apply a payment to such a debt.(*w*) And it should seem to be in accordance with reason and authority, that, if there be two debts, one of which is legal and the other illegal, the appropriation must be made to the one which is legal.(*x*)

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that the maker of the accommodation note could only be held liable for what balance there at any time remained due on the note. In Field *v.* Carr, 5 Bing. 13, 2 Moore & P. 46, the defendant accepted a bill drawn by C., who indorsed it to his bankers, who entered it upon the credit side of C.'s account, but when it was dishonored entered it upon the debit side. A few days after the dishonor the defendant paid the amount of the bill to C., but omitted to take the bill out of the bank. C. afterwards paid into the bank more than enough to cover the items preceding the bill and the bill itself. The bankers treated the bill as paid for three years, and then sued the banker on his acceptance. He was held not liable. But then a bill may be given and continue a security, if intended to be a continuing security. Pease *v.* Hirst, 10 B. & C. 122, 5 Man. & R. 88. But see Williams *v.* Rawlinson, 3 Bing. 71, 10 J. B. Moore, 362, Ryan & M. 233.

(*u*) Thompson *v.* Brown, Moody & M. 40.

(*v*) James *v.* Child, 2 Tyrw. 732, 2 Cromp. & J. 252. In Grigg *v.* Cocks, 4 Sim. 438, the circumstances were peculiar. A, who was a solicitor in the country, received money from a client to pay for him into chancery. A got a bill for the sum from a country banker, and remitted it to his London bankers without notifying them of the above circumstances. A was indebted to his bankers for £450, for which they held securities, and this account was kept separate from the general account between the bankers and A. A died, and the bill became due a few days afterwards, and was paid, and the amount was carried to the general account by the bankers, and the accounts were still kept separate until after the bankers had been notified of the purpose for which the bill was given. Ultimately they paid over the balance of the proceeds of the bill, deducting the £450 of the separate account, to the executrix of A. It was held, that there was no agreement to keep separate accounts by the bankers, and that they had no notice at the time, or before the amount was received, of the purpose to which it was to be applied, and therefore the proceeds of the bill could not be collected of them by the client.

(*w*) Mills *v.* Fowkes, 5 Bing. N. C. 455, 7 Scott, 444. Where an action was brought for a balance of a banking account, a question arose whether a disputed sum above six years due had been paid by the plaintiffs by the defendant's authority. It was held that the jury, having found that the payment was authorized by the defendant, the plaintiffs were entitled to apply subsequent unappropriated payments of the defendants in discharge thereof, so as to prevent the operation of the Statute of Limitations. Williams *v.* Griffith, 5 M. & W. 300.

(*x*) Wright *v.* Laing, 3 B. & C. 165, 4 Dowl. & R. 782; Ribbans *v.* Crickett, 1 B. & P. 264; Ex parte Randleson, 2 Deacon & Ch. 534. In Biggs *v.* Dwight, 1 Man. & R

When the appropriation comes to be determined by law, the merits and equities of the case are regarded, and the rights of third persons which have intervened are closely considered, so that where a factor has funds in his hands from goods sold for his principal and consignor, he cannot apply such funds to the bills of his principal alone, drawn against such proceeds, in preference to bills drawn by his principal and a surety, which surety relied upon the credit of the goods which were in the factor's hands.(*y*) And where a bank holds security for the payment of notes made by the cashier of a bank, and there are balances on the books in his favor, such a balance may be appropriated to the payment of such notes, instead of being applied to reduce the damages for breach of his bond.(*z*)

SECTION IV.

OF SATISFACTION.

A JUDGMENT on a bill or note, even without satisfaction, may be a discharge of it, as between the parties to the suit, for the judgment remains as a valid claim; but without satisfaction it certainly does not discharge the other parties. The old doctrine of merger has been much qualified, but some questions in relation to it are still undetermined. In regard to negotiable paper, it seems certain that a holder may recover a judgment against a party, and even take out an execution, without losing his rights against other parties, until the execution is satisfied. In fact, we should say that a judgment in any action cannot work a merger, except as between the parties to that action.(*a*)

308, a payment was allowed to be appropriated by the creditor to a bill which was void for want of a stamp. But there were circumstances indicating that the consent of the debtor was given to such an application. Philpott *v.* Jones, 2 A. & E. 41; Cruickshanks *v.* Rose, 1 Moody & R. 100.

(*y*) Brander *v.* Phillipp, 16 Pet. 121.

(*z*) Dedham Bank *v.* Chickering, 4 Pick. 314.

(*a*) Bayley, 335; Claxton *v.* Swift, 2 Show. 441, 494, 1 Lutw. 882; Tarleton *v.* Allhusen, 2 A. & E. 32. In England, it has been contended that a mere warrant of attorney was a merger of the debt; but in Norris *v.* Aylett, 2 Camp. 329, an action was brought upon a bill of exchange by the payee against the acceptor. The defence was rested upon the following facts. An action had been previously commenced upon the

Nor would other parties be discharged by an execution issued against a party; nor by the discharge of a party from execution, but without payment; (*b*) nor by the taking of a higher

same bill. It was, however, agreed by the parties that the defendant should pay the costs, renew the bill, and give a warrant of attorney to secure the debt. The defendant did renew the bill, and give the warrant of attorney, but did not pay the costs. The substituted bill was indorsed by the plaintiff, and was outstanding in the hands of a third party; but was dishonored and taken up by the plaintiff before the trial, and was in his possession unsatisfied. Lord *Ellenborough* said, that, as judgment had not been entered up, the warrant of attorney was but a collateral security, which could not merge the original debt. The following circumstances present themselves in a number of cases. The maker and indorser, or the drawer and acceptor of a bill or note, respectively, are sued separately, and judgments recovered against them. The party who is not primarily liable pays the judgment against himself, and takes an assignment of the judgment against the party liable before him. In Bacon *v.* Searles, 1 H. Bl. 88; Beck *v.* Robley, note *a*, a bill was drawn by A on B, and by him accepted, and then indorsed, payable to C. The bill not being paid by the acceptor, the drawer and indorser took it up, and it was held that no action could be maintained by them against the acceptor. But in Williams *v.* James, 15 Q. B. 498, a bill was drawn by P. payable to his own order, and accepted by the defendant. The drawer took up the bill, and redelivered it to the holder, who appeared as plaintiff, at the drawer's request. Lord *Campbell* held that, *prima facie*, a payment by the drawer will operate for the benefit of the acceptor; but it is in the power of the drawer when he pays the bill so to limit as to provide for remedies against the acceptor. He might under these circumstances take back the bill, and sue upon it in his own name, or he might pass the bill to another person to sue upon it for him, and to the indorser whom he has paid as lawfully and reasonably as to any other person. In Wilson *v.* Wright, 7 Rich. 399, J. gave his note to W., by whom it was indorsed to N., who recovered separate judgments against J. and W.; the latter was paid by W., and an assignment taken by him of the one against J. On a rule to show cause why satisfaction should not be entered of the judgment of N. against J., now held by W., it was held that the payment made by the latter was not a payment of the judgment against the maker, and that W., as assignee, might recover. *O'Neall*, J. said: "How that which was never intended to be satisfaction, and which by the assignment is conclusively shown was intended to operate in discharge of the indorser merely, and as a purchase of the judgment against the maker, can have the implied effect of satisfaction of the judgment, I never have been able to comprehend. . . . . It cannot be justice, that he who is ultimately liable for a debt should be discharged by a payment made by one after him to discharge himself alone, and with the intent to keep the debt still against him who was liable before him." Callow *v.* Lawrence, 3 M. & S. 95. See Noonan *v.* Gray, 1 Bailey, 437, which may be considered overruled by Wilson *v.* Wright, or perhaps distinguishable because the assignment was not contemporaneous. The case was never satisfactory to the bar or the bench. Allston *v.* Allston, 2 Hill, S. Car. 362, 2 Rich 428, note *a*. See also Davis *v.* Barckay, 1 Bailey, 140; Tolbert *v.* Harrison, id. 599; Ex parte Clark, Dudley, S. Car. 111; Cooper *v.* Scott, 2 McMullan, 150; Bayley on Bills, 352. In Rice *v.* Wright, 7 Rich. 407, there were separate judgments against joint and several makers; the bail of one of the parties paid the judgment and took assignments, which was held good against the other maker.

(*b*) If judgment is no satisfaction, there seems to be no reason that an unsatisfied execution should so operate. Therefore, even if a party be discharged from an execu-

security as a specialty.(*c*) Even if a specialty be given and received only as security between the parties, it does not affect the original bill or note as to them.(*d*) And if a bill or note is renewed, and the old bill held, the new one operates as an agreement to suspend the old one until the maturity of the new one; (*e*) and if the new one be then dishonored, the old one revives; and if the new one, being paid, leaves the interest on the old one unpaid, that may be recovered by suit on the old one, unless there has been an agreement to the contrary.(*f*)

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tion under a *ca. sa.*, though this is satisfaction as to him it is not so as to the other parties, who are not the sureties of the party so discharged. Hayling *v.* Mulhall, 2 W. Bl. 1235; English *v.* Darley, 2 B. & P. 61, 3 Esp. 49; Mayhew *v.* Crickett, 2 Swanst. 185, 190; Clarke *v.* Clement, 6 T. R. 525, per Lord *Kenyon*. See McDonald *v.* Bovington, 4 id. 825. These cases hold that the holder of negotiable paper may give time or take security from a party on a bill without discharging those liable prior to the party so indulged; but those subsequent to such a party are discharged, — because if they had been compelled to pay they would have had their immediate resort to those who preceded them, per Lord *Eldon*. But waiving a *fi. fa.* against the goods of a party does not discharge any other party. Pole *v.* Ford, 2 Chit. 125. In Per Lee *v.* Onderdonk, 19 Barb. 562, O., the last indorsee of a promissory note, obtained a judgment against the makers and indorsers. An execution was issued, and had been levied upon the personal property of the makers sufficient to satisfy the judgment (or, if the levy was insufficient, it was the fault of the sheriff, who had rendered himself responsible). P., the third indorser, paid the judgment, with the understanding that it was to be assigned to him. The plaintiff's prayer was, that an assignment should be decreed, and that he should be allowed to recover on the judgment which was assigned to him. But it was held, inasmuch as the lien which was once acquired against the estate of the maker had been lost and waived by the interference of the plaintiff, that, so far as the indorsers were concerned, the debt on the note must be considered paid, and so they were not liable.

(*c*) Bayley, 6th ed. 334; Bac. Abr., *Extinguishment*, D.

(*d*) Bedford *v.* Deakin, 2 B. & Ald. 210, 2 Stark. 178. The plaintiff sued three defendants, Deakin, Bickley, and Hickman. The two last pleaded bankruptcy, and the last the general issue. The partnership had been dissolved. Before the dissolution the bills in suit were dishonored. After the dissolution, Bickley undertook by deed to pay the partnership debt on the bills. The holder of the bill of exchange consented to take the separate notes of one partner, Bickley, reserving the right against all three and the possession of the original bills. The plaintiff, when the separate notes proved unproductive, was allowed to resort to his remedy against all the partners; and though the separate notes were several times renewed, this made no difference, and there was no satisfaction of the joint debt. Nor does it appear that Deakin, one of the partners, had any knowledge of the renewal of the securities, per *Abbott*, C. J. *Bayley* and *Holroyd*, J. J.

(*e*) Kendrick *v.* Lomax, 2 Cromp. & J. 405, 2 Tyrw. 438; Ex parte Barclay, 7 Ves. 597; Bishop *v.* Rowe, 3 M. & S. 362; Dillon *v.* Rimmer, 1 Bing. 100, 7 J. B. Moore, 427.

(*f*) Lumley *v.* Musgrave, 4 Bing. N. C. 9, 5 Scott, 230; Lumley *v.* Hudson, 4 Bing. N. C. 15, 5 Scott, 238. An alteration may destroy and so discharge a bill; but if the

It has been sometimes held as a rule of law, that any simple contract debt may be discharged, before a breach of it, by agreement only, without a seal, and without a consideration.(*g*) If the contract is on both sides executory, it may certainly be rescinded ; and as the giving of each promise was a consideration for the other, so the giving up of each is a consideration for the giving up of the other.(*h*) After a breach, it is said that there can be no valid release but for a consideration, or by a seal which implies one. Bills and notes are only simple contracts ; but upon this point, as in so many others, their peculiar nature (especially when negotiable) requires for them peculiar rules of law. What these are in respect to the present question may not be quite certain. We should state them. however, thus.

If the holder and payee of a note or bill, whether negotiable or not, without a seal or a consideration, declare to the payor that he does, or promise that he will, renounce his right and claim, and will never sue the note, this declaration or promise, whether made before or after breach, will not bar any suit by the holder against the payor, provided the holder retains possession of the

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second bill be so discharged, it has been held that an action may be brought on the first. Sloman *v.* Cox, 1 Cromp. M. & R. 471, 5 Tyrw. 174.

(*g*) Langden *v.* Stokes, Cro. Car. 383, Com. Dig., On the Case in Ass., G. ; Conier and Holland's Case, 2 Leon. 214 ; King *v.* Gillett, 7 M. & W. 55. The case of Langden *v.* Stokes, Cro. Car. 383, was one of an agreement to go a certain voyage before a certain day. This it was held could be dispensed with without consideration or seal. In King *v.* Gillett, there were mutual promises to marry. In Treswaller *v.* Keyne, Cro. Jac. 620, the plaintiff agreed to travel and help the defendant to search for a will. It seems that in all the cases the mutual contracts were executory. It does not seem by any means clear that if the contract be on the one side executed, that a mere agreement would be a sufficient release ; for there appears no consideration. The rule seems to be correctly stated, "*Nudi consensus obligatio contrario consensu dissolvitur.*" Even when both parts of the contract are obligatory, the dispensation with performance must be mutual and assented to on either side. For one party cannot put an end to a contract, and refuse to do that for which there is a consideration, without the assent of the other party. These doctrines cannot be applied to negotiable paper. While in the hands of the original party, and between the maker and payee, the bill, if without consideration, is a nude pact ; if with consideration, there is an executed consideration on one side ; and the same effect results from taking the paper *bona fide* for value. Where such is the case, the contract cannot be rescinded except by release and satisfaction. If the money be paid back, and the contract so rescinded is rescinded by what may be termed with perfect accuracy *satisfaction*. See Ruggles *v.* Patten, 8 Mass. 480 ; Crawford *v.* Millspaugh, 13 Johns. 87 ; Champlin *v.* Butler, 18 id. 169 ; Foster *v.* Dawber, 6 Exch. 839, note by the American editors. After a breach there must be *satisfaction* or *release*. Byles, 182.

(*h*) See preceding note.

note. But if, when making this promise, and in execution of it, the holder gives up to the payor the note or bill, he can no longer maintain any action upon the paper (in the absence of fraud) against the payor, and all other parties are discharged as much as by a payment of the note or bill.

If he make such a declaration or promise before or after maturity, for a valid consideration which is really beneficial to the holder, and retain possession of the note, this is a giving and receiving of satisfaction for the same, and it is the equivalent of payment as to all parties to the note, and as to all who may become holders of it after maturity, or with knowledge; and his possession of the note gives him no more rights under it than if it had been paid. But if the transaction took place before maturity of the note (even if the release be for consideration or under seal) and afterwards, but also before maturity, the note is indorsed for value to an innocent holder, such holder is unaffected by this agreement.(*i*) But no agreement, even on consideration, not to sue a note for a limited time, has even the effect to bar a suit during that time.(*j*) All that it gives to the promisee is a right to bring his action for damages if an action be brought against him within that time.

A bill of exchange is not satisfied by the drawer's bequeathing a legacy to the payee, though he be the holder at the time of the testator's death; (*k*) but it has been held that an entry in the testator's book, in his own handwriting, that the maker of a note, which he, the testator, held, should pay no interest, and should not be called upon for the principal, discharged the note.(*l*)

(*i*) Dod *v.* Edwards, 2 Car. & P. 602, per *Tenterden*, C. J. *Brougham*, in defence, said: "I am in a condition to show that the bill was indorsed on November 21; that on October 4th, the drawer put it out of his power to indorse by giving a general release to the defendant." Lord *Tenterden* said: "You must show that the plaintiff knew it. If you cannot show that the plaintiff was aware of the release, your defence fails. If it were not so, you would put an end to the circulation of bills."

(*j*) Thimbleby *v.* Barron, 3 M. & W. 210, holds that the covenant not to sue for a limited time will not suspend the right of action, but will only operate by way of giving the covenantee damages for a breach of covenant. A subsequent or contemporaneous collateral agreement, on a good consideration, not to sue for a limited time on a bill or note, has precisely the same effect. Ford *v.* Beech, 11 Q. B. 842; Webb *v.* Spicer, 13 Q. B. 894.

(*k*) Carr *v.* Eastabrooke, 3 Ves. 561.

(*l*) Ashton *v.* Pye, cited Eden *v.* Smyth, 5 Ves. 341, 350, note.

SECTION V.

OF RELEASE.

What is called a technical release, or an express release, is a release under seal. The seal implies a consideration; it therefore makes the release as effectual as if it were made for a valid consideration, but not any more so.

An express release, or a release for a consideration, is good as between the parties, although the releasor is not at the time the holder of the bill.(*m*) But a release of a drawee, before he becomes acceptor, is no bar to an action against him on his acceptance.(*n*) A release of one of joint promisors, or of one of joint and several promisors, is a release of all.(*o*) Judgment and execution against one of several debtors would, it seems, operate a discharge of all.(*p*) A mere parol agreement cannot defeat a release.(*q*) Payment by one joint promisor or debtor is an extinguishment of the debt or note.(*r*)

(*m*) Scott *v.* Lifford, 1 Camp. 246, 9 East, 347. In an action by a payee against the drawer of the bill of exchange, a release to the acceptor by the defendant renders the former a competent witness for the latter. In this case the counsel urged that when the drawer had paid the bill he could maintain an action against the acceptor. At that time (when the release was given) the drawer had not possession of the bill.

(*n*) In Ashton *v.* Freestun, 2 Man. & G. 1, 2 Scott, N. R. 273, it is held that the plea must show that the acceptor had accepted the bill before the release was given by which he claims to be discharged. In Drage *v.* Netter, 1 Ld. Raym. 65, Hartley *v.* Manton, 5 Q. B. 247, a release to a drawee before acceptance was held inoperative. This was upon the ground that a release can only operate upon existing rights.

(*o*) Co. Lit. 232 *a*; Nicholson *v.* Revill, 4 A. & E. 675, 6 Nev. & M. 192, 1 Har. & W. 753; Tuckerman *v.* Newhall, 17 Mass. 581. The rule applies to a release of one of several joint trespassers. Co. Lit., s. 376. The following are cases of joint and several debtors. Solly *v.* Forbes, 2 Brod. & B. 38; Ex parte Gifford, 6 Ves. 805. See, however, Nicholson *v.* Revill, 4 A. & E. 675, quoted *supra*.

(*p*) See Brooks *v.* Stuart, 1 Per. & D. 615, 9 A & E. 854; Cocks *v.* Nash, 9 Bing. 341, in which cases the terms of the instrument have restrained the operation of the release.

(*q*) 2 Rol. Ab. 412; Lacy *v.* Kynaston, 2 Salk. 575, 2 Saund. 47, note *t*; Cheetham *v.* Ward, 1 B. & P. 630; Nicholson *v.* Revill, *supra*; Brooks *v.* Stuart, 9 A. & E. 854, 1 Per. & D. 615.

(*r*) Steele *v.* Harmer, 14 M. & W. 831. Tuckerman *v.* Newhall, 17 Mass. 581. This was a case of a joint and several promissory note. It was held that in relation to release and discharge, there was no difference between a joint note and a joint and several one. In Bryant *v.* Smith, 10 Cush. 169, A, as guardian of an insane person, received a joint note signed by B and C. B, being afterwards appointed guardian of the

A covenant not to sue generally, although at law the equivalent of a release, operates only against the covenanter, and those who can make out their claim only by him or through him; but not against one who is liable jointly with him.(*s*) And if one of two joint creditors make a covenant not to sue, it seems that this has not the effect of a release.(*t*)

A release of a debt discharges all sureties; and the reason is, first, that the debt is paid by the release; and secondly, that if the principal be released, and the sureties are made to pay, they cannot recover against the principal, because his debt was already discharged. Therefore neither the reason nor the rule applies, where there is a covenant never to sue a principal, or even a technical release under seal of a principal, provided there is an express reservation of all rights against the sureties; for this will give them by implication a right to sue their principal. This question has arisen in the case of assignment, in trust for creditors; where the debtor stipulates that any creditor who becomes a party shall release and discharge him, but shall retain his rights against his indorsers or other sureties. The effect of the rule is beneficial to the indorsers, because, the principal being insolvent, the creditor would look wholly to them.(*u*)

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insane person, received the ward's property, including the note, and gave A a receipt in full. B afterwards brought an action against C on the note, in the name of A, the promisee. It was held that the note was paid by such surrender and that no action could be sustained. The maker of an indorsed note, in one case, Gloucester Bank *v.* Worcester, 10 Pick. 528, assigned his property in trust for the benefit of creditors. The indenture was signed by the indorser, and contained a general release by the creditors, but reserving all collateral securities to the holders thereof. The indorser was still held on the note, and estopped to deny that he knew the contents of the indenture. See also Parsons *v.* Gloucester Bank, id. 533.

(*s*) Dean *v.* Newhall, 8 T. R. 168; Hutton *v.* Eyre, 6 Taunt. 289. In Dean *v.* Newhall, the obligee of a bond covenanted not to sue one of two joint and several obligors, and that, if he did, the deed of covenant might be pleaded in bar,—but he was allowed to sue the other obligor. See Fitzgerald *v.* Trant, 11 Mod. 254; Lacy *v.* Kinnaston, Holt, 178, 1 Ld. Raym. 688, 12 Mod. 548. In the last case it is said: "A is bound to B, and B covenants never to put the bond in suit against A; if afterwards B will sue A on the bond, he may plead the covenant by way of release. But if A and B be jointly and severally bound to C, in a sum certain, and C covenants with A not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A, but does not covenant not to sue B; for the covenant is not a release in its nature, but only by construction to avoid circuity of action; for when he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant and no more." Lord *Kenyon* approved of this case in Dean *v.* Newhall, cited *supra*

(*t*) Walmesley *v.* Cooper, 11 A. & E. 216, 3 Per. & D. 149.

(*u*) See note *r*, *infra*, p. 239.

Whereas, under such an arrangement, the creditor will get what he can from the insolvent, and come on the indorsers, as sureties only, for the balance; and then they are at liberty to get what indemnity they can from their principal. So, if a holder of a bill renounce or suspend, or for valid consideration promise to renounce or suspend, his right of action against an acceptor,(*v*) the drawers and indorsers are discharged, unless it is

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(*v*) Tindal *v.* Brown, 1 T. R. 167. The holder of a promissory note called upon the maker upon the day of payment, and also upon the two days next following. This was done before notice of dishonor was given to the defendant, an indorser. The indorser was held to be discharged, and *Buller*, J., said: "As to giving time the holder does it at his peril." In this case, the defendant, when the tardy demand was made on him, was quite correct in his remark that "the plaintiff had made it his own." English *v.* Darley, 2 B. & P. 61. This was a case of composition, and the indorser was discharged. Hubbly *v.* Brown, 16 Johns. 70; Beardsley *v.* Warner, 6 Wend. 610; Woodman *v.* Eastman, 10 N. H. 359; Fowler *v.* Brooks, 13 N. H. 240. Story on Notes, § 413. It makes no difference whether the agreement for delay be made before or after the maturity of the note. Bradford *v.* Hubbard, 8 Pick. 155; Lobdell *v.* Niphler, 4 La. 294; Millaudon *v.* Arnous, 15 Mart. La. 596; Burrill *v.* Smith, 7 Pick. 291; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Sargent *v.* Appleton, 6 Mass. 85. But of course such an agreement, as far as the promisor is concerned, must be founded on a valuable consideration. Gould *v.* Robson, 8 East, 576; Clark *v.* Devlin, 3 B. & P. 363; Anderson *v.* George, 1 Selw. N. P., 11th ed. 410; Price *v.* Edmunds, 10 B. & C. 578; Smith *v.* Becket, 13 East, 187; Wood *v.* Jefferson Co. Bank, 9 Cowen, 194; Nolte *v.* Creditors, 19 Mart. La. 9; 1 Pardes. 423, 424; Philpot *v.* Briant, 4 Bing. 717, 1 Moore & P. 754; Bank of U. S. *v.* Hatch, 6 Pet. 250. In this case it was held that an agreement to continue till the next term an action against the drawer on the bill, made with him for a valuable consideration, operated a discharge of the indorser. Had the continuance been voluntary and discretionary on the part of the plaintiffs, the case would have been different. M'Lemore *v.* Powell, 12 Wheat. 554. The ground taken was that it was an agreement to suspend and delay the remedy, and not an agreement to allow the particular suit to stand continued, leaving the bank at liberty to discontinue it, and commence a new suit on the bill immediately. This too, although such continuance would not postpone the remedy or recovery as long as the discontinuance and renewal of proceedings. "If the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him." King *v.* Baldwin, 2 Johns Ch. 554, per Chancellor *Kent;* Laxton *v.* Peat, 2 Camp. 185. In this case the bill was drawn by H. and accepted by the defendant for his accommodation. Of this the holder was aware, and at maturity received part payment from H., and gave him time to pay the rest. The acceptor was held merely a surety, and therefore discharged. See Ellis *v.* Galindo, 1 Doug. 250, note. In Lee *v.* Levi, 1 C. & P. 553, the holder, after he had sued the acceptor and the indorser, had taken from the former a *cognovit* for the amount of the bill, payable by instalments. *Abbott*, C. J. thought at the trial that the indorser was discharged by the time given. This case was revised, Lee *v.* Levy, 6 Dowl. & R., by the

a part of the contract, that if the acceptor do not pay the bill, the holder shall have a judgment against him as early and as

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whole court; and although the decision was reversed, it was upon a point foreign to the ruling of the Chief Justice stated above. That the Chief Justice was not overruled is the opinion of Mr. Justice *Story* in U. S. Bank *v.* Hatch, 6 Pet. 250, 259, where he delivers the decision of the whole court. Lobdell *v.* Niphler, 4 La. 295; Millaudon *v.* Arnous, 15 Mart. La. 596; Hefford *v.* Morton, 11 La. 115; Browne *v.* Carr, 7 Bing. 508; Philpot *v.* Briant, 4 id. 717, 719, 721, 1 Moore & P. 754, 3 C. & P. 214; Wild *v.* Bank of Passamaquoddy, 3 Mass. 505; Hewet *v.* Goodrich, 2 C. & P. 468. In Sargent *v.* Appleton, 6 Mass. 85, the drawer was held not to be discharged by a discharge of the acceptor, where such acceptor had no funds of the drawer in his hands. When this is the case, the rule seems to be that even demand of the drawer of a bill or check may be dispensed with. In English *v.* Darley, 3 Esp. 49, the indorser and acceptor of a bill had been sued. Against the latter there had been an execution, and afterwards a compromise, — the holder having accepted £100 in part discharge, and taken a bond and warrant of attorney for payment of the remainder by instalments. This was held to discharge the indorser. Dyke *v.* Mercer, 2 Show. 394; Walwyn *v.* St. Quintin, 1 B. & P. 652. If security be taken with assent of indorser, the holder is not deprived of his remedy. Clark *v.* Devlin, 3 B. & P. 363. In Gould *v.* Robson, 8 East, 576, Lord *Ellenborough* said; "How can a man be said not to be injured if his means of suing be abridged by the act of another? If the plaintiffs, holders of the bill, had called immediately upon the defendants for payment as soon as the bill was dishonored, they might immediately have sued the acceptor and the other parties to the bill. I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time; he may make what arrangements he pleases with the acceptor; but he does that at his peril, and if he thereby alter the situation of any other person on the bill to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill; but here the holder did something more; he took a new bill from the acceptor, and was to keep the original bill till the other was paid. That is an agreement that in the mean time the original bill should not be enforced; such is at least the effect of the agreement, and therefore I think time was given." See remarks of Chief Justice Best, Philpot *v.* Briant, 4 Bing. 717, 719, 721. The same rule of law holds in the case of an agreement for delay with one of joint makers without consent of indorsers. Kennard *v.* Knott, 4 Man. & G. 474, reporter's note. It must be remembered that any agreement for delay without consideration, though not communicated to the indorser, is no defence to the latter. M'Lemore *v.* Powell, 12 Wheat. 554; Walwyn *v.* St. Quintin, 1 B. & P. 652. It appeared that, after the bill had become due and been protested, the acceptor was told that he should not be pressed. This was held no discharge of the drawer, by Lord C. J. Eyre. Lord *Eldon*, in English *v.* Darley, 2 B. & P. 61, said, as long as the holder remains passive, his remedies remain. Arundel Bank *v.* Goble, Chitty on Bills, 413; Badnall *v.* Samuel, 3 Price, 521; Creath *v.* Sims, 5 How. 192. See Bay *v.* Tallmadge, 5 Johns. Ch. 305; Lenox *v.* Prout, 3 Wheat. 520; Rees *v.* Berrington, 2 Ves. Jr. 540; Reynolds *v.* Ward, 5 Wend. 501; Bank of Utica *v.* Ives, 17 Wend. 501; Norris *v.* Crummey, 2 Rand. 323; Hunter *v.* Jett, 4 Rand. 104; M'Kenny *v.* Waller, 1 Leigh, 434; Alcock *v.* Hill, 4 id. 622. All these cases show that there must be a binding agreement to give delay to the principal debtor. Hill *v.* Bull, Gilmer, 149; Jones *v.* Bullitt, 2 Littell, 49, 467; Hunt *v.* Bridgham, 2 Pick. 581; Crane *v.* Newell, id. 612; Bellows *v.* Lovell, 4 id. 153, 5 Pick. 307; Boultbee *v.* Stubbs, 18 Ves. 20; Strafford Bank *v* Crosby,

effectual as he could have by any proceedings.(*w*) Then, the drawer and indorsers may profit by this agreement, but cannot be hurt. But, unless the agreement to give time be made with one who is a party to the bill, it will not operate a discharge of other parties.(*x*)

SECTION VI.

WHAT INDULGENCE DISCHARGES INDORSERS.

It is a general rule, resulting from a principle very frequently applied, that anything whatever done by a holder of a bill or note,(*y*) which must necessarily have the effect of destroying,(*z*)

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8 Greenl. 191; Frye *v.* Barker, 4 Pick. 382; Oxford Bank *v.* Lewis, 8 id. 458; Blackstone Bank *v.* Hill, 10 Pick. 129; Hunt *v.* United States, 1 Gallis. 32; Claridge *v.* Dalton, 4 Maule & S. 232, per Bayley, J.; Hall *v.* Cole, 4 A. & E. 577; Scarborough *v.* Harris, 1 Bay, 177; Robertson *v.* Vogle, 1 Dall. 252; James *v.* Badger, 1 Johns. Cas. 131; Kenworth *v.* Hopkins, id. 107.

(*w*) Kennard *v.* Knott, 4 Man. & G. 474, 5 Scott, N. R. 247. See Price *v.* Edmunds, 10 B. & C. 578, 5 Man. & R. 287. See also Hall *v.* Cole, 4 A. & E. 577, 6 Nev. & M. 124; Hulme *v.* Coles, 2 Sim. 12; Michael *v.* Myers, 6 Man. & G. 702. Action by indorsee against an indorser. It was held no defence that in an action against the drawer the plaintiff had consented to a judge's order, that upon payment of debt and costs in one month all proceedings should cease, otherwise the plaintiff to be at liberty to sign final judgment. This too, though the plea stated that judgment could have been obtained before the end of the month, inasmuch as such order did not amount to an absolute stay of proceedings.

(*x*) Lyon *v.* Holt, 5 M. & W. 250. The plaintiff was an indorsee of a bill of exchange which he alleged had been drawn and indorsed to the defendant, by him to W., and by W. to the plaintiff. The defence was, that the defendant had indorsed to H. for the latter's accommodation, and without consideration, and H. had indorsed to W., from whom the plaintiff had it. After the bill was due and dishonored, the plaintiff and H. stated an account respecting this and other dishonored bills, on which H. was liable to the plaintiff, and agreed to take from B. renewed bills in place of them, and not to press any parties for payment of the original bills, &c. This agreement was proved at the trial, but it appeared that *no indorsement* was made by H. to W. This was held to be material, and as H. was not a party to the bill, no agreement with him with regard to the bill could discharge the defendant. The plaintiff had a verdict.

(*y*) As a release to an acceptor or maker. So a general covenant not to sue has been held to enure as a release. Com. Dig. Release. A covenant not to sue upon a simple contract for a limited term is not pleadable in bar to an action of contract against the principal debtor. Thimbleby *v.* Barron, 3 M. & W. 210.

(*z*) Couch *v.* Waring, 9 Conn. 261. The holder of a promissory note commenced suit against the maker and recovered judgment, and execution was satisfied, but then the holder instituted a suit against the indorser for a balance of interest due on the note

delaying,(*a*) lessening, or in any way embarrassing the rights or remedies of other parties against parties to them, discharges all the parties thus injuriously affected (*b*) from any claim by the holder himself, or by any who must claim by or through him.(*c*) But a parol promise, with or without consideration, to look to one only of two joint promisors, or a parol discharge of a note, has been held to be no discharge of such note.(*d*)

The question, what degree or what kind of indulgence or

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and not included in the judgment which was still unsatisfied. But the Supreme Court of Connecticut held that the maker was discharged from all further liability, because of the rule *nemo debet bis vexari eadem causa*, and that there was no remedy against the indorser. The discharge of any party to a note will be a discharge of all those whose liability is subsequent to that of the party so discharged. Sargent *v.* Appleton, 6 Mass. 85. In Ex parte Smith, 3 Bro. Ch. 1, Cooke, B. L. 171, 8th ed., it was held that, where an indorser becomes bankrupt, and the holder proves the bill under his commission, and afterwards compounds with the acceptor, whom he discharges, without notice to the indorser's assignees, the estate of the indorser is thereby discharged, and the proof of the debt must be expunged. Lynch *v.* Reynolds, 16 Johns. 41; Lewis *v.* Jones, 4 B. & C. 506; English *v.* Darley, 2 B. & P. 61; Clark *v.* Devlin, 3 id. 363. See also Nisbet *v.* Smith, 2 Bro. Ch. 579, *in notis*. In English *v.* Darley, the plaintiff sued the drawer, and took in payment of the judgment cash and security for the remainder. The indorser was held discharged thereby. Withall *v.* Masterman, 2 Camp. 179; Laxton *v.* Peat, 2 Camp. 185; Gould *v.* Robson, 8 East, 576; Claridge *v.* Dalton, 4 M. & S. 226; Fentum *v.* Pocock, 5 Taunt. 192.

(*a*) *Supra*, p. 239, note *v*.

(*b*) See p. 243, note *g*. Trimble *v.* Thorne, 16 Johns. 152; Sterling *v.* Marietta, &c. Trading Co., 11 S. & R. 179; Beardsley *v.* Warner, 6 Wend. 610; Freeman's Bank *v.* Rollins, 13 Maine, 202. The holder may remain passive. It is the business of the surety to see that the principal pays. If he does not, the surety may pay and take measures for his indemnity, unless the holder binds himself to give further time. M'Lemore *v.* Powell, 12 Wheat. 554; Frye *v.* Barker, 4 Pick. 382; Hunt *v.* Bridgham, 2 id. 585, 2d ed., note 3, and cases cited; Beebe *v* West Branch Bank, 7 Watts & S. 375; Oxford Bank *v.* Lewis, 8 Pick. 458; Central Bank *v.* Willard, 17 id. 150.

(*c*) Kennard *v.* Knott, 2 Man. & G. 474; Michael *v.* Myers, 6 id. 702. In those cases it was agreed, to be sure, that the right of action should be suspended; but there was also a stipulation to the effect that, in case of any default, the holder should have judgment at as early a period as he could have obtained it had hostile proceedings been continued. See also Isaac *v.* Daniel, 8 Q. B. 500. It appears that, unless some such stipulation be inserted in the agreement, the plea disclosing such an agreement need not aver that the time was postponed within which the plaintiff might have obtained judgment. It lies upon the one who asserts it to reply specially, or, if the form of the plea admits it, to prove it under a traverse of the forbearance. The decision in Sizer *v.* Heacock, 23 Wend. 81, is very much akin to those above. In that case it is held, that, if the holder accepts judgment against the maker, and gives time on that, the indorser will not be discharged if the time given would not be greater than would have elapsed had a suit been commenced and pursued with diligence.

(*d*) Ruggles *v.* Patten, 8 Mass. 480.

delay shall have the effect of discharging indorsers, presents in some cases considerable difficulty. The indorser's or drawer's contract is a species of suretyship,(*e*) and there are two ways in which this state of things may be viewed. In one, as soon as a due presentment and demand have been made, and due notice given of dishonor, the indorser's liability is fixed.(*f*) He is now a principal debtor himself, and no longer a mere surety; and no delay or indulgence to the maker or prior party discharges the indorser, and he has no right to require of the holder any further efforts or diligence to obtain payment from the prior party.(*g*) The indorser can pay the note when he pleases, and so making it his own, proceed against a prior party at his own pleasure.(*h*) The other view would regard an indorser as a surety only on certain conditions, the first of which are presentment, demand, and notice; and when these conditions are complied with, his liability is fixed, and attaches to him definitely. But it attaches to him still only as a surety. He was in the beginning and is now a surety, only responsible for the debt of another; and it remains the duty of the holder to protect the interests of the surety still, by exerting due care and diligence to get payment if he can from the prior party. This care and diligence, and the rights of the indorser to require suit, and the

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(*e*) Clark *v.* Devlin, 3 B. & P. 363, 366. In Griffith *v.* Reed, 21 Wend. 502, a bill was drawn on one party by another; a third party subscribed his name under that of the drawer, adding the word surety. This was held to be an undertaking with the payee or subsequent holder that the bill should be accepted and paid, but that the signer incurred no obligation to the drawees.

(*f*) Beardsley *v.* Warner, 6 Wend. 610, 613. The moment the note is dishonored, and notice of that fact duly given to the indorser, the holder's right to sue him is perfect, and this right is not impaired so long as he remains passive. Wood *v.* Jefferson Co. Bank, 9 Cowen, 194, 206; English *v.* Darley, 2 B. & P. 61.

(*g*) In Pain *v.* Packard, 13 Johns. 174, the doctrine laid down was this: that, if an obligee or holder of a note were *requested* by the *surety* to proceed without delay and collect the money of the principal, who is then solvent, and he neglects to comply with the request, and the principal afterwards becomes insolvent, the surety is exonerated. See Beardsley *v.* Warner, 6 Wend. 610. It has been expressly decided in New York that the principle above stated is not applicable where the indorser is called upon to pay. Trimble *v.* Thorne, 16 Johns. 152. "The indorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the bill when dishonored." Mere delay to sue the maker of a note does not discharge the indorser. Powell *v.* Waters, 17 Johns. 176; Worsham *v.* Goar, 4 Port. Ala. 441 Where an indorser neglected to sue a previous indorser for three years, he was held free from any neglect.

(*h*) *Supra*, p. 242, note *b*.

like, are, in this view of the case, the same we have already considered in relation to sureties generally.(*i*) And accordingly, if there be any want of due care and diligence, and the indorser is damnified thereby, his loss is, just as far as it goes, a defence against a claim or suit by the holder.(*j*)

It will be observed, that this latter view restores the parties to negotiable paper, after dishonor, demand, and notice, to the common law of contracts; while the former considers the relations created by indorsement as permanent, and as always continuing under the law merchant and the peculiar rules which attach to negotiable paper. The American authorities are very much divided upon this subject; (*k*) but on the whole, we think the stronger authorities, as well as the better reasons, are in favor of the former view.(*l*)

(*i*) See Chapter on Principal and Surety. In Beardsley *v.* Warner, 6 Wend. 610, 613, it was said, "the indorser cannot require of the creditor to exhaust his remedies against the maker before he calls upon him to perform his contract. It is not of the essence of the contract between the holder and indorser, that he should seek payment of the maker and not of the indorser only on the contingency of an inability on the part of the maker to pay. King *v.* Baldwin, 17 Johns. 393; Ruggles *v.* Holden, 3 Wend. 216." In Trimble *v.* Thorne, 16 Johns. 152, it was held, that if the holder of a promissory note be called on by the indorser, after the note has become due, to prosecute the maker, of whom the debt might then be collected, but who afterwards becomes insolvent, and he neglects to do so, this is no defence for the indorser. Beebe *v.* West Branch Bank, 7 Watts & S. 375.

(*j*) The following American cases are to the same effect. Couch *v.* Waring, 9 Conn. 261; Wood *v.* Jefferson Co. Bank, 9 Cowen, 194; Okie *v.* Spencer, 2 Whart. 253; Seventh Ward Bank *v.* Hanrick, 2 Story, 416; Newcomb *v.* Raynor, 21 Wend. 108; Hawkins *v.* Thompson, 2 McLean, 111; Woodman *v.* Eastman, 10 N. H. 359.

(*k*) In some States of the Union it appears that the indorser is under the same rules of law as an ordinary surety, and that due diligence must be used to bind him, as is the case with the latter. Lee *v.* Love, 1 Call, 497; Bronaugh *v.* Scott, 5 id. 78; Smallwood *v.* Woods, 1 Bibb, 542; Perrin *v.* Broadwell, 3 Dana, 596; Horton *v.* Frink, 5 Day, 530; Huntington *v.* Harvey, 4 Conn. 124; Treadway *v.* Drybread, 4 Blackf. 20; Bishop *v.* Yeazle, 6 id. 127; Pillard *v.* Darts, 6 Misso. 358; Kilpatrick *v.* Heaton, 3 Brev. 92; Ricketson *v.* Wood, 10 Misso. 547; Bestor *v.* Walker, 4 Gilman, 3; Hopper *v.* Sisk, 1 Smith, Ind. 102. Merriman *v.* Maple, 2 Blackf. 350. This was a case in which the assignee of a note delayed to sue the maker for thirty days after it became due. The indorser was held excused unless the holder could show an earlier proceeding useless or impossible. But where an assignee did not collect the note because he did not resort to an extraordinary process of law, this was held no laches. Oldham *v.* Bengan, 2 Littell, 132. See also Perrin *v.* Broadwell, 3 Dana, 596; Henshaw *v.* Coe, Kirby, 50; Alday *v.* Jamison, 3 Port. Ala. 112.

(*l*) That mere indulgence or delay will not have the effect of discharging the indorser of negotiable paper — that there is no obligation to use that diligence which the surety has a right to demand of the principal, at least when the surety calls upon the

The giving of time to a maker or acceptor (*m*) before maturity, so as to prevent a demand when due, or any neglect to make a demand, will, of course, discharge other parties. There is no rule relating to negotiable paper more nearly universal than this, and we have collected in our note some of the almost innumerable cases on this subject which might deserve the name of leading cases.(*n*) But an arrangement, the intention of which

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principal to use it — appears in the following cases. Bank of South Carolina *v.* Myers, 1 Bailey, 412; Powell *v.* Waters, 17 Johns. 176; Worsham *v.* Goar, 4 Port. Ala. 441; Stafford *v.* Yates, 18 Johns. 327; Sterling *v.* Marietta Co, 11 S. & R. 179; State Bank *v.* Wilson, 1 Dev. 484. Freeman's Bank *v.* Rollins, 13 Maine, 202. In this case it was held that the holder must so bind himself to give time on the note that an action on said instrument cannot be maintained. In this case there was a request by the indorser to the holder to commence a suit against the maker. The holder also released property attached on a writ by failing to enter the action, and the property was afterwards conveyed. Bank of U. S. *v.* Hatch, 6 Pet. 250; Lenox *v.* Prout, 3 Wheat. 520; Fulton *v.* Matthews, 15 Johns. 433; Bank of Utica *v.* Ives, 17 Wend. 501. In this case the holder received securities, but did not make any binding agreement not to sue. Orme *v.* Young, Holt, N. P. 84; Hunt *v.* Bridgham, 2 Pick. 581; Frye *v.* Barker, 4 id. 382; Crane *v.* Newell, 2 id. 612; Oxford Bank *v.* Lewis, 8 id. 458.

(*m*) It is settled law in the courts of equity, that giving time to a principal without the concurrence of a surety discharges the latter. Bank of Ireland *v.* Beresford, 6 Dow, 33; Archer *v.* Hale, 4 Bing. 464, 1 Moore & P. 285. Where the obligee of a bond with a surety, without communication with the surety takes notes from the principal and gives further time, the surety will be discharged. Rees *v.* Berrington, 2 Ves. Jr. 540; English *v.* Darley, 2 B. & P. 61; Tidd, 9th ed., 1260. See 2 Am. Lead. Cas., Hare & Wallace's ed. 98; Hunt *v.* Bridgham, 2 Pick. 581, 585, notes, and cases cited; King *v.* Baldwin, 2 Johns. Ch. 554; Miller *v.* McCan, 7 Paige, 451; Gifford *v.* Allen, 3 Met. 255; Rathbone *v.* Warren, 10 Johns. 587; Solomon *v.* Gregory, 4 Harrison, 112; Crosby *v.* Wyatt, 10 N. H. 318; New Hampshire Savings Bank *v.* Ela, 11 id. 335; Bank of Steubenville *v.* Hoge, 6 Ohio, 17; Comegys *v.* Booth, 3 Stew. 14; Clippinger *v.* Creps, 2 Watts, 45; Wayne *v.* Kirby, 2 Bailey, 521; Harnsberger *v.* Geiger, 3 Grat. 144; Shirtliffe *v.* Gilbert, 1 Bay, 466; Sharpe *v.* Bingley, 3 Const. R. 373; Moodie *v.* Morrall, id. 367; Kiddell *v.* Ford, id. 678. If the holder of a note accepts a check from the maker payable six days after the note falls due, in full payment of the note when the check is paid, the indorser is thereby discharged. Okie *v.* Spencer, 1 Miles, 299, 2 Whart. 253. And the Pennsylvania rule is, that, if the holder accepts part of the money from the drawer, and gives time to the rest, the indorser is discharged. Robertson *v.* Vogle, 1 Dall. 252.

(*n*) Moss *v.* Hall, 5 Exch. 46. The plea disclosed consideration. The drawee was held discharged. Snydam *v.* Vance, 2 McLean, 99. The defendant was an indorser of a promissory note, and seems to have been considered as a surety. In Lee *v.* Levy, 4 B. & C. 390, 6 Dowl. & R. 475, the indorsee having brought actions against indorser and acceptor, took of the latter a cognovit for payment of the debt by instalments. The verdict was for the defendants. In Isaac *v.* Daniel, 8 Q. B. 500, the holder gave time for a valuable consideration; held a defence. Gould *v.* Robson, 8 East, 576; Fiddy *v.* Campbell, 2 Brev. 21. In Kilpatrick *v.* Heaton, 3 id. 92, it appeared that the holder had received part payment of the maker, and waited a year; it was held

is to give time,(*o*) has no such effect if there be no bargain for delay, and this bargain or agreement must be made valid by a sufficient consideration, to have the effect of discharging the indorser.(*p*) The reason is, that taking a new note, (*q*) or new security,(*r*) affects other parties only beneficially,(*s*) if the whole right of immediate demand and suit is retained,(*t*) and there be

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that the indorser was discharged. These cases seem to take the ground that exclusive credit given to the maker will discharge other parties. See *contra*, James *v.* Badger, 1 Johns. Cas. 131; Farmers' Bank *v.* Reynolds, 13 Ohio, 85; Hubbly *v.* Brown, 16 Johns. 70; Mayhew *v.* Boyd, 5 Md. 102, is a very strong case; Payne *v.* Commercial Bank, 6 Smedes & M. 24; Okie *v.* Spencer, 2 Whart. 253; McDowell *v.* Bank, 1 Harring. Del. 369.

(*o*) It has been *contended* and declared, that any credit given by the holder of the bill to drawer, acceptor, indorser, or promisor, is a consent to hold the demand upon their responsibility, and that a holder has no remedy afterwards against any other parties. Shaw *v.* Grifith, 7 Mass. 494.

(*p*) Bagley *v.* Buzzell, 19 Maine, 88. A note was payable on demand, and was transferred when overdue by an indorsement in these words: "Accountable in eight months from the above date" (the date of the indorsement). The indorsee gave the indorser a bond not to sue the maker in eight months. This bond was held to be given on a collateral agreement to which the maker was no party, and no extension of time was thereby given, and that the indorser was liable without demand or notice. Ashley *v.* Gunton, 15 Ark. 415. "After the indorser has been fixed by demand, protest, and notice, mere forbearance by the holder not based upon any obligatory contract with the holder for day (delay?), and which does not impair any of the substantial rights of the indorser, cannot work his discharge," per *Scott*, J. See Peake *v.* Dorwin, 25 Vt. 28. There must be a valid contract, per *Isham*, J. See Talmage *v.* Burlingame, 9 Barr, 21; Mathews *v.* Aikin, 1 Comst. 595; Wilkes *v.* Harper, 2 Barb. Ch. 338; Sawyer *v.* Patterson, 11 Ala. 523; Draper *v.* Romeyn, 18 Barb. 166.

(*q*) Robertson *v.* Vogle, 1 Dall. 252. The holder received a check from the maker, payable six days after the note, and to be in full when cashed. This was held a discharge of the indorser. Shaw *v.* Nolan, 8 La. Ann. 25. A new note was taken, payable one day later. Held, indorser discharged. Gould *v.* Robson, 8 East, 576; Walters *v.* Swallow, 6 Whart. 446; Okie *v.* Spencer, 2 id. 253.

(*r*) Pring *v.* Clarkson, 1 B. & C. 14, 2 Dow. & R. 78. See also Bedford *v.* Deakin, 2 B & Ald. 210, 2 Stark. 178; Twopenny *v.* Young, 3 B. & C. 208; Ripley *v.* Greenleaf, 2 Vt. 129; Oxford Bank *v.* Lewis, 8 Pick. 458; Badnall *v.* Samuel, 3 Price, 521.

(*s*) In Hightower *v.* Ivy, 2 Port. Ala. 308, the indorsee had brought a suit against the maker, and during its pendency refused to receive part payment thereof. The maker was held thereby to have lost so much of his claim against the indorser.

(*t*) The People *v.* Jansen, 7 Johns. 332; Hunt *v.* The United States, 1 Gallis 32; Deming *v.* Norton, Kirby, 397; Ludlow *v.* Simond, 2 Caines, Cas 1; Walsh *v.* Bailie, 10 Johns. 180; Rathbone *v.* Warren, id. 587; Com. of Berks Co *v.* Ross, 3 Binn. 520; King *v.* Baldwin, 2 Johns. Ch. 554; Burn *v.* Poang, 3 Desaus. Ch. 596; Butler *v.* Hamilton, 2 id. 226; Rutledge *v.* Greenwood, 2 id. 389; Huie *v.* Bailey, 16 La. 213. In Hurd *v.* Little, 12 Mass. 502, a bill was protested for non-acceptance, and due notice given to the other parties. The holder then took collateral security from the drawer, which he relinquished upon learning that the drawee would probably pay the bill at

due demand and notice.(*u*) It seems, however, to be generally admitted that the receiving of security, payable at a future time, implies an engagement to wait until the security becomes due.(*v*) A mere refusal or neglect to pursue all remedies against a maker or acceptor,(*w*) or an agreement not to press him, there being

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maturity. The bill was partly paid at maturity, and was regularly protested for the non-payment of the residue. It was held that the holder had not given any time to the drawer, merely having taken new security without any additional credit. In Wood *v.* Jeff. County Bank, 9 Cowen, 194, the holder agreed with the maker to sue the indorser; if he failed to collect the debt, then he was to have security at two years. This agreement was held to deprive the indorser of no rights, and therefore he had no defence to the suit.

(*u*) In Crain *v.* Colwell, 8 Johns. 384, the holder received part payment, and gave no notice to the indorser, who was of course thereby discharged. See also Lynch *v.* Reynolds, 16 Johns. 41. In James *v.* Badger, 1 Johns. Cas. 131, and Kennedy *v.* Motte, 3 McCord, 13, the holder received part payment and gave due notice to the indorser, who was thereby made liable for the balance. Hurd *v.* Little, 12 Mass. 502; Bank of South Carolina *v.* Myers, 1 Bailey, 412; Hoffman *v.* Coombs, 9 Gill, 285.

(*v*) Sigourney *v.* Wetherell, 6 Met. 553, holds that the guarantor of a note is not discharged by the holder's taking collateral security from the maker, if he does not also give him time. But the doctrine of the text is favored by the following authorities. Baker *v.* Walker, 14 M. & W. 465; Gahn *v.* Niemcewicz, 11 Wend. 312; Wood *v.* Jefferson Co. Bank, 9 Cowen, 194; Hill *v.* Bostick, 10 Yerg. 410; Hurd *v.* Little, 12 Mass. 502. In Hall *v.* Cole, 4 A. & E. 577, 6 Nev. & M. 124, 1 Har. & W. 723, A, the drawer of a bill, indorsed it to B. B indorsed it back to A, who indorsed it to C. C then took a *cognovit* from A, and by this B was held to be discharged, provided C knew that A, the drawer, and the indorser, were identical. And so taking a bond or a negotiable security, payable at a future time, without the assent of the other parties, will discharge them from liability. Claxton *v.* Swift, 3 Mod. 86; Bank of Wilmington *v.* Simmons, 1 Harring. Del. 331. In Gould *v.* Robson, 8 East, 576, the holder accepted part payment, and agreed to take acceptances for the balance due on the bill. This was very properly held to amount to an agreement to give further time or a new credit, and to work the discharge of an indorser who was no party to the contract, although at the time the drawer had no effects in the hands of the acceptor. Mohawk Bank *v.* Van Horne, 7 Wend. 117; Bailey *v.* Baldwin, id. 289; Union Bank *v.* Hall, Harper, 245.

(*w*) A holder of a bill may forbear to sue as long as he pleases. The negligence must be active, not merely passive Orme *v.* Young, Holt, N. P. 84; Eyre *v.* Everett, 2 Russ. 381; Samuell *v.* Howarth, 3 Meriv. 272; Wright *v.* Simpson, 6 Ves. 734, per Lord *Eldon;* Trent Navigation Co. *v.* Harley, 10 East, 34; Clarke *v.* Wilson, 3 M. & W. 208; Combe *v.* Woolf, 8 Bing. 156, 1 Moore & S. 241, is the case of a guaranty. But see Brown *v.* Carr, 7 Bing 508; Powell *v.* Waters, 17 Johns. 176, 8 Cowen, 669; Stafford *v.* Yates, 18 Johns. 327; Lenox *v.* Prout, 3 Wheat. 520; Hunt *v.* Bridgham, 2 Pick. 581, id. 2d ed., 585, note 3; Stout *v.* Ashton, 5 T. B. Mon. 251. The case of M'Lemore *v.* Powell, 12 Wheat. 554, is one in which it is held that anything which is a mere agreement, without consideration, will not discharge an indorser. In Philpot *v.* Briant, 4 Bing. 717, 1 Moore & P. 754, the executrix of an acceptor verbally promised to pay the holder out of his own estate if he would forbear to sue. He forbore accordingly, but as the contract was not binding under the Statute of Frauds, the drawer was held not to be discharged. In Beardsley *v.* Warner, 6

due demand and notice,(x) does not discharge other parties; and, under similar circumstances, a gratuitous agreement by the holder of a bill with the acceptor, made on the last day of grace, to look alone to him for payment, and neither to present the bill nor notify the drawer, will not relieve the drawer if the protest is made and notice given.(y)

It has also been held that prior parties are not discharged by the holder's releasing the acceptor, where the drawer retained funds of the acceptor to meet the bill; (z) nor where an assignment with release contained a proviso that nothing in it should "impair or affect any lien or pledge hereafter created or obtained, as security for a debt or claim due," because such a proviso saves the claim by indorsement, as it is now well settled that an agreement between the creditor and the principal debtor that the surety shall not be discharged, will prevent the surety from being discharged, although he is no party to, and has no knowledge of, the stipulation.(a) But it also seems to be

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Wend. 610, *nom.* Warner *v.* Beardsley, 8 id. 194, it was held that the principle of law that a surety is discharged if a creditor on request neglects to pursue his remedy against his principal, solvent at the time, and who subsequently becomes insolvent, is not applicable to the case of an indorser of a promissory note. See for this rule, Pain *v.* Packard, 13 Johns. 174, which case holds that, if an obligee or holder of a note is requested by the surety to proceed without delay, and collect the money of the principal, who is then solvent, and he neglects to comply with the request, and the principal afterwards becomes insolvent, the surety is exonerated. Trimble *v.* Thorne, 16 Johns. 152; Thibodeau *v.* Patin, 13 Mart. La. 478.

(x) *Supra*, p. 247, note *w*.

(y) De Witt *v.* Bigelow, 11 Ala. 480. This is but another phase of the general rule that an agreement to give time must be legally binding on the holder in order to discharge the indorsers. Low *v.* Underhill, 3 McLean, 376; Lockwood *v.* Crawford, 18 Conn. 361.

(z) In Sargent *v.* Appleton, 6 Mass. 85, the acceptor was discharged. The drawer had retained the acceptor's funds in his hands for the express purpose of meeting the bill. In this case the drawer, who stands in the place of the indorser of a note, was held not to be discharged. See also Hubbly *v.* Brown, 16 Johns. 70. In Bank of South Carolina *v.* Myers, 1 Bailey, 412, a judgment was confessed by the maker to the indorser for security, and was held equivalent to notice to him.

(a) Burke's Case, cited 6 Ves. 809; Boultbee *v.* Stubbs, 18 id. 20; Ex parte Glendinning, Buck, 517; Ex parte Carstairs, id. 560; Harrison *v.* Courtauld, 3 B. & Ad. 36; Nichols *v.* Norris, id. 41, note; Cowper *v.* Smith, 4 M. & W. 519; Smith *v.* Winter, id. 454; Kearsley *v.* Cole, 16 id. 128. It appears also from Cowper *v.* Smith, that it is by no means uncommon to insert a stipulation to the effect that a composition with the principal shall not affect the release of the surety. In Pannell *v.* M'Mehen, 4 Harris & J. 474, A made a negotiable note to B, who indorsed it to C, by whom it was indorsed to D. A and B made a composition deed with their creditors, and cou-

settled, that the stipulation, to have this effect, must appear on the face of the instrument, and cannot be supplied by parol. And it is clear that whenever the indorser or surety, by words or acts, assents to what has been done, this will be a waiver of his discharge.(*b*)

If a holder accepts from one maker an order on a third party for a part of the amount, with a verbal agreement that it should satisfy his whole claim against that maker, and that he would look to the other for the balance,(*c*) he is not thereby prevented from suing that maker from whom he received the order; nor does a release to a payee discharge a maker, unless the releasor knew that the note were only for the accommodation of the payee; (*d*) nor is a maker discharged by a release to an indorser, even, perhaps, when the releasor knew that the maker was in fact only a surety to the indorser; (*e*) nor by a holder's

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veyed all their estate to trustees, among whom was C, and were discharged with this proviso, "that the said release shall not operate in favor of, or be construed to release any persons or person who may be bound, &c. for A and B, or either of them, or who may have indorsed any note or notes drawn or indorsed by the said A and B, or either of them." D brought an action against C, who had received proper notice, and he was held liable. See Gray *v.* Brown, 22 Ala. 262.

(*b*) Mayhew *v.* Crickett, 2 Swanst. 185; Smith *v.* Winter, 4 M. & W. 454. See also Stevens *v.* Lynch, 12 East, 38, 2 Camp. 332. The drawer, not knowing that he was discharged (as he really was) by time given the acceptor, said: "I know I am liable, and if the acceptor does not pay, I will." This was held a waiver of his discharge. We think, however, that this case carries the doctrine of waiver very far indeed, and we doubt whether the reason of the law of the case is sound. It has been held, that, where a bill was received, and an indorsee said, "It was the best thing that could be done," this was no recognition of liability. Withall *v.* Masterman, 2 Camp. 179; Clark *v.* Devlin, 3 B. & P. 363; Tindal *v.* Brown, 1 T. R. 167; English *v.* Darley, 2 B. & P. 61.

(*c*) Wright *v.* Allen, 4 Vt. 572.

(*d*) Carstairs *v.* Rolleston, 5 Taunt. 551, 1 Marsh. 207. It was held formerly, if a bill be accepted without consideration, that, since the acceptor is the surety for the drawer, the release of the drawer or time given him would discharge the acceptor; but time given the acceptor would not release the drawer. Laxton *v.* Peat, 2 Camp. 185; Yallop *v.* Ebers, 1 B. & Ad. 698; Collott *v.* Haigh, 4 Camp. 281. But this distinction has been overruled in Fentum *v.* Pocock, 5 Taunt. 192, 1 Marsh. 14; Carstairs *v.* Rolleston, 5 Taunt. 551, 1 Marsh. 207. In Price *v.* Edmunds, 10 B. & C. 578; *Parke*, J. thought Fentum *v.* Pocock "good sense and good law"; but Lord *Eldon* doubted it in equity. Ex parte Glendinning, Buck, 517; Bank of Ireland *v.* Beresford, 6 Dow, 233. See, however, Harrison *v.* Courtauld, 2 B & Ad. 36; Nichols *v.* Norris, 3 B. & Ad. 41, note. An accommodation acceptor, it seems, is entitled to all instruments and securities given by the principal. Dowbiggin *v.* Bourne, Younge, 111.

(*e*) When a drawee had an open account with a drawer, and it was understood and agreed that he should accept and pay the bill, the bill is to be treated as for value, and

relinquishing attachment, if in good faith, and on receipt of other security, although the substituted security fails; (*f*) nor by receiving partial payment; (*g*) and in one case it was held to be no bar to an action against one of joint promisors, that another had paid his share, and in consideration thereof the payee had acquitted all the promisors.(*h*) If principal and interest on a protested bill be received of a guarantor, an action may be maintained against the drawer for damages, and we think it should be so held, even if there were no express reservation of the right to sue for damages, as there was in the case decided.(*i*) So a joint and several maker of a note, who is in fact a surety for the other, is not discharged by the holder's receiving interest in advance of the principal after the note is due, if he make no valid contract to give time; (*j*) nor will a general discharge of a

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no regard is to be paid to the state of accounts between acceptor and drawer, nor does the discharge of the latter discharge the former. The holder's rights are the same as when he took the bill, notwithstanding subsequently acquired knowledge. See English *v.* Darley, 2 B. & P. 61; Claridge *v.* Dalton, 4 M & S. 226; Bagnall *v.* Andrews, 7 Bing. 217; Orr *v.* Maginnis, 7 East, 359; Blackhan *v.* Doren, 2 Camp. 503; In re Brown, 2 Story, 521; Mallet *v.* Thompson, 5 Esp. 178. Laxton *v.* Peat, 2 Camp. 185. conflicts, perhaps, with the doctrine in the text. So Collott *v.* Haigh, 3 Camp. 281. But see Kerrison *v.* Cooke, 3 Camp. 362; Fentum *v.* Pocock, 5 Taunt. 192. Also Yallop *v.* Ebers, 1 B. & Ad. 698; Price *v.* Edmunds, 10 B. & C. 578; Nichols *v.* Norris, 3 B. & Ad. 41, note; Harrison *v.* Courtauld, id. 36; Rolfe *v.* Wyatt, 5 C. & P. 181; Bank of Montgomery Co. *v.* Walker, 9 S. & R. 229, *nom.* Walker *v.* Bank of Montgomery Co, 12 S. & R. 382; White *v.* Hopkins, 3 Watts & S. 99; Lewis *v.* Hanchman, 2 Barr, 416; Commercial Bank *v.* Cunningham, 24 Pick. 270; Church *v.* Barlow, 9 id. 547; In re Babcock, 3 Story, 393; Lambert *v.* Sandford, 2 Blackf. 137; Clopper *v.* Union Bank of Md., 7 Harris & J. 92; Claremont Bank *v.* Wood, 10 Vt. 582; M'Donald *v.* Magruder, 3 Pet. 470; Flint *v.* Day, 9 Vt. 345; Brown *v.* Mott, 7 Johns. 361; Bank of Ireland *v.* Beresford, 6 Dow, 233, per Lord *Eldon;* Ex parte Glendinning, Buck, 517.

(*f*) Bank of Montpelier *v.* Dixon, 4 Vt. 587.

(*g*) English *v.* Darley, 2 B. & P. 61; James *v.* Badger, 1 Johns. Cas. 131.

(*h*) In Ruggles *v.* Patten, 8 Mass. 480, the plea in bar by the defendant was that one promisor other than himself had paid his share or proportion of the money to the promisee before the note was assigned, and in consideration thereof the promisee had acquitted all the promisors from any further demand on the note. It was held, that, if the defendant would avail himself of such a defence, he must plead it in abatement, and that a payment of a part by one promisor cannot operate as a discharge of the rest.

(*i*) In Tombeckbe Bank *v.* Stratton, 7 Wend. 429, the obligation of the surety was distinct and independent, and the payment by the surety could in no way be considered a payment by the agents of the defendants. The case appears to have been put by the counsel for the defence upon the ground that it is a rule of law that the payment of the principal of a debt operates as an extinguishment of the interest and bars its recovery in a suit.

(*j*) Oxford Bank *v.* Lewis, 8 Pick. 458. Action on a joint and several promissory note, payable to the order of the plaintiff, signed by H. B. and R. H., and by S. J. and

mere guarantor of a bill discharge an acceptor; (*k*) nor will the filling of an early blank indorsement to make it payable to the holder, and a suit thereon, discharge the later indorsers, if their names are not stricken out,(*l*) and if one of them pay the note he may sue a prior one; and if an indorser whose liability has been properly fixed writes on the back of the note, at the request of the holder, that he will be holden for a certain time if the maker be not sued, it is no discharge or limitation of his legal liability; and where the holder of a protested bill drew a new one on drawer and acceptor jointly, for the old one with damages, and this was accepted by the acceptor of the first but not by the drawer, it was held that the drawer was not discharged.(*m*)

But, on the other hand, it has been held, that, if a holder of a note that is overdue agrees to receive payment of the maker in certain goods at a certain price, at a future day, this agreement discharges an indorser; and if holder, drawer, and acceptor agree that acceptor shall pay anything less than the whole that is due, the drawer is said to be discharged; (*n*) and so will the giving up to the maker of property held from him as security for the note discharge an indorser, unless the holder can show that the indorser is not injured; (*o*) and where an insolvent drawer assigned his property for his creditors, providing among the rest for an indorser on his bill, and the indorser signed the indentures, thereby releasing the drawer, it was held that this accepted the provision instead of any further claim on the acceptor, whom he could no longer sue. The bill was accepted and indorsed for the accommodation of the drawer, who was to take it up.(*p*)

It may be important, however, to distinguish between the

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the defendants as sureties. R. H. made two payments on the note, and afterwards paid interest for sixty days in advance, then absconded, carrying all his property with him The defendants were not held to be discharged because the holders retained the power of suing.

(*k*) *Supra*, p. 250, note *i*.

(*l*) Cole *v.* Cushing, 8 Pick. 48.

(*m*) For a discussion of the subject of the remainder of this section, see also chapter on Payment by Bill or Note, where may be found a full collection of all the authorities in England and the United States.

(*n*) De la Torre *v.* Barclay, 1 Stark. 7.

(*o*) Haslett *v.* Ehrick, 1 Nott & McC. 116.

(*p*) Bradford *v.* Hubbard, 8 Pick. 155.

extinguishment of a claim and the satisfaction of it; for many of the cases we have already cited show that while a holder's claim is extinguished as to some of the parties, it is not always thereby affected as to the rest; but if it be once satisfied as to any party, it is satisfied as to all.

A bank when it has refused payment of a draft or check during business hours, and after business hours receives funds, and is then called on by the notary, is not, it is said, bound to pay the bill; but should inform the notary of the receipt of the money.(*q*) But the distinction might be open to the objection, that the notice can be of little use, because the notary must still go on with his protest and notice, &c., or take the risk upon himself.

If a bank which holds a note receive money of the maker on deposit after dishonor, it is said not to be obliged to apply the money to the note, but may permit the depositor to draw it out, and still hold an indorser.(*r*)

If one of two who are joint holders sue a maker, this does not bar an action by both jointly against a guarantor or indorser.(*s*) So a judgment against one of two joint makers is no bar to a joint action against both.(*t*) But if a note be payable by instalments, a judgment on the note, for any instalment, has been held, as we have intimated, a bar to any future action upon it.(*u*)

As satisfaction to one partner is satisfaction to all the members of the firm, so, if a person be a partner in two firms, a satisfaction which would bar one firm would bar both; although the person who belongs to both knows nothing of the transaction. So, if a house receive funds from the drawer to meet a bill, and

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(*q*) Whitaker *v.* Bank of England, 1 Cromp. M. & R. 744.

(*r*) Martin *v.* Mechanics' Bank, 6 Harris & J. 235.

(*s*) Cobb *v.* Little, 2 Greenl. 261. In the action against Cragne, the maker, Cobb declared upon the note that it was indorsed to him, and being a blank indorsement it might be alleged to have been indorsed to a person to whom Cobb had transferred it by delivery. For convenience he might sue in his own name, only as indorsee, though he was not the sole owner. But as to the guaranty which was sued upon, under the words of guaranty were written (by one of the plaintiffs, to be sure): "To Matthew Cobb and Nathan Kinsman," the plaintiffs.

(*t*) Sheehy *v.* Mandeville, 6 Cranch, 253. The two defendants did not join in the same plea in bar, but severed; had the former been the case, the question presented would have been one of much greater intricacy, per Chief Justice *Marshall*.

(*u*) Siddall *v.* Rawcliff, 1 Moody & R. 263.

misapply them, neither that house, nor any firm a member of which is also a member of the first house, can sue the drawer; or the acceptor, if he is entitled to this defence of the drawer.(*v*)

SECTION VII.

OF CONTRIBUTION.

If two or more persons are jointly liable,(*w*) or jointly and severally liable, on a note or bill, in any way, or on any ground, or to any extent, and one or more of them pay more than his aliquot share of the amount, the parties paying can recover of the others who were bound to pay, their share, by way of contribution.(*x*) And it makes no difference that the debt, if it be the same or different portions of the same, is received by different instruments and executed by different sureties.(*y*) But the payment must be by compulsion of law; not necessarily by a suit or process,(*z*) but by a legal and fixed obligation,(*a*) which rests on all alike. The right of a co-surety to contribution from his fellows is not prejudiced by his possessing a security against the principal which the defendant neither has nor knows anything about.(*b*) And if a co-surety on a note give a bond for it, and pay the bond, he still has this claim, although the co-sureties knew nothing of the bond. And if a surety release one co-surety, this does not affect his claim on the rest. This obligation arises when the relation of co-promisor or co-surety begins;

(*v*) Jacand *v.* French, 12 East, 317.

(*w*) Harris *v.* Warner, 13 Wend. 400. The party must appear distinctly to be in the position of a co-surety before he can be held liable as one to contribution. In this case the defendant had signed his name after that of the plaintiff and two other sureties, "as surety for the above names." He was held not to have assumed the liability of a co-surety. In fact he distinctly refused to be so held.

(*x*) In Davis *v.* Emerson, 17 Maine, 64, the co-surety, who had paid the debt and costs, was allowed to recover the aliquot part of the debt and the costs also. Henderson *v.* McDuffee, 5 N. H. 39; Pitt *v.* Purssord, 8 M. & W. 538; Gould *v.* Fuller, 18 Maine, 364; Boardman *v.* Paige, 11 N. H. 431; Fletcher *v.* Jackson, 23 Vt. 581.

(*y*) Deering *v.* Winchelsea, 2 B. & P. 270; Mayhew *v.* Crickett, 2 Swanst. 184.

(*z*) The costs of a suit cannot be recovered of a co-surety unless the plaintiff is authorized to defend the suit. Knight *v.* Hughes, 3 Car. & P. 467, Moody & M. 247.

(*a*) Pitt *v.* Purssord, 8 M. & W. 538; Davies *v.* Humphreys, 6 id. 153.

(*b*) Done *v.* Walley, 2 Exch. 198.

and the discharge of one as to his principal, does not discharge him as to the co-sureties, if they pay on the original obligation. But the right of action for contribution begins only when one actually pays more than his share, and consequently the Statute of Limitations does not begin to run until then.(*c*) The right to contribution rests upon an implied promise; (*d*) and the law will not raise it against an express agreement, or against a stronger and opposite presumption, and therefore not in favor of one against a co-surety who became surety at his request.(*e*)

SECTION VIII.

OF PRESUMPTION OF PAYMENT FROM MERE LAPSE OF TIME.

No doubt silence with regard to negotiable paper will, after a certain time, give rise to the presumption that it has been paid, although it should remain in the possession of the holder who was entitled to receive payment on it.(*f*) As where a check was given by the plaintiff to the defendant, and many years afterwards the defendant made a note to the plaintiff, to be indorsed by him for the accommodation of the defendant, it was held that the presumption would be that the check had been settled or accounted for.(*g*)

In Connecticut, the same presumption of payment from lapse of time is applicable to non-negotiable promissory notes as to bonds, and the absence of the debtor from the State during the greater portion of the time relied on to raise such a presumption will rebut the presumption itself, whether his absence is in an adjoining or a remote State.(*h*)

(*c*) Davies *v.* Humphreys, 6 M. & W. 153; Cowell *v.* Edwards, 2 B. & P. 268; Browne *v.* Lee, 6 B. & C. 689.

(*d*) Kemp *v.* Finden, 12 M. & W. 421, in which case it was held that the proper action of a co-surety against another co-surety was assumpsit for money paid to the co-surety's use.

(*e*) Turner *v.* Davies, 2 Esp. 478.

(*f*) Especially if connected with other circumstances. Perkins *v.* Kent, 1 Root, 312. See Bailey *v.* Jackson, 16 Johns. 210; Wells *v.* Washington, 6 Munf. 532.

(*g*) M'Rae *v.* Boast, 3 Rand. 481. Of course such a presumption may be rebutted and met by contradictory evidence.

(*h*) Daggett *v.* Tallman, 8 Conn. 168.

CHAPTER IX.

OF A LOST NOTE OR BILL.

SECTION I.

OF THE NOTICE TO BE GIVEN, AND ITS EFFECT.

When a note, bill, or check is lost or stolen, it is proper and prudent for the loser to give immediate notice of the loss to all the parties to the paper.(*a*) This notice should require the parties liable not to pay the amount, except to the loser, or his order; (*b*) and in the case of an unaccepted draft, the drawee should be ordered also not to accept it on presentment for acceptance. A drawee who, without knowing the loss of a negotiable bill, pays it *bona fide*, and duly, and in the course of business, to any holder, is discharged thereby from all further liability upon the bill.(*c*)

But if he pay the amount before it is due, although he pay it without notice, and to a *bona fide* holder, he is still liable to the loser,(*d*) for the payment is out of the ordinary course of business. The same rule would doubtless apply to any other payment of the note which was a distinct departure from the course

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(*a*) Beckwith *v.* Corrall, 2 Car. & P. 261, 3 Bing. 444, 11 J. B. Moore, 335; Poth. Du Contrat de Change.

(*b*) "Whenever a possessor discovers that he hath lost a bill, he ought instantly, or at least before the day of payment, to advise the acceptor thereof, with the precaution not to pay it to any other than him or his order, and in case another come to recover, to stop it, and advise him thereof." Beawes, Lex Merc., Bills of Exch. 179. Marius advises that the notice and warning should be delivered to the acceptor in the presence of a notary and two witnesses. Beawes, pl. 185.

(*c*) Lawson *v.* Weston, 4 Esp. 56; Anonymous, 1 Salk. 126, 3 id. 71. The loser "may have trover against the finder, for he had no title, though a payment to him had indemnified the bank." Id., per Lord *Holt*. See Smith *v.* Sheppard, cited in Chitty on Bills, 9th ed. 395.

(*d*) Da Silva *v.* Fuller, Sel. Cas. 238, quoted in Chitty on Bills, 9th ed. 395.

of business. One reason is, that such conduct creates a suspicion of fraud. Another is, that if a bill or note be paid before maturity, a notice of loss might reach the owner before its maturity, though after the actual day of payment; and the owner's right of countermanding payment, which continues until maturity, unless he loses it by gross negligence, or by this premature payment, has been wrongfully taken away.(*e*)

Perhaps the rule, as gathered from the authorities and the reason of the case, may be stated thus. A loser of a bill has no claim on a payor who pays it because he is bound to pay it, but may have, and generally would have, a claim against a payor who paid it without legal necessity, although without notice.

If, after notice of the loss of a bill, check, or note, the maker, acceptor, or banker discount or pay it to any holder who has not given value for it, he does it at his peril, and will be liable again to the owner.(*f*) If the person presenting the note be its *bona fide* holder for value, it would probably be held that the payor may make payment, notwithstanding the loser has forbidden him to do so, and the payment will be a full discharge, because the *bona fide* purchaser of a note before maturity holds it by an absolute title.

It is well, however, for the drawee with notice to obtain indemnity even from a holder for value, as he may not be able to prove that the assignment was in perfect good faith. It seems quite clear that it is no sufficient ground of defence in such case by the acceptor of a bill, that the payee has written to him, stating that it was lost, and ordering him not to pay it to any one but himself.(*g*)

Besides the notice to the parties, the loser of a bill or note should also immediately (*h*) inform the public of his loss, warning all persons from negotiating the lost instrument.(*i*)

(*e*) This reason may be illustrated by an analogous case stated by Marius, in his work on Bills, 2d ed., Phila., 1790, pp. 72, 73.

(*f*) Lovell *v.* Martin, 4 Taunt. 799.

(*g*) Lumbeth *v.* Rivarde, 16 La. 572.

(*h*) In Beckwith *v.* Corrall, 2 Car. & P. 261, *supra*, note *a*, the plaintiff was robbed of a negotiable security eight days before it was payable, and did not give notice of his loss till the end of seven days, and then only to the payor, giving no notice of any kind to the public. It was held that he did not use due diligence, and could not recover in trover from the party who discounted the security six days after the loss.

(*i*) Beckwith *v.* Corrall, *supra*, note *h*; Snow *v.* Peacock, 3 Bing. 406, 11 J. B. Moore 286; Lawson *v.* Weston, 4 Esp. 56; Matthews *v.* Poythress, 4 Ga. 287.

In case of theft, this notice is proper for an additional reason, namely, that it may assist in the apprehension of the robber.(*j*) The notice should contain, if possible, a full and accurate description of the instrument, in all its particulars, and the terms employed in the advertisement must not be such as to mislead a reader.(*k*)

In England, the custom seems to be, by the reported cases, not only to forward notice to all the banking-houses where the missing bill is likely to be taken, but also to circulate handbills and post placards through the city where it is lost,(*l*) and in case of bills which will probably be sent to the Continent, to advertise the notice there.(*m*)

Ordinarily, the newspapers are the most natural and convenient vehicles of a notice to the public. But they are not the only valid means, since handbills, placards, and the like, may answer the same purpose.(*n*) But in Louisiana, by statute, the

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(*j*) Lancaster *v.* Walsh, 4 M. & W. 16; Bridger *v.* Heath, Chitty on Bills, 9th ed., 253, note *m*. See Stockley *v.* Clement, 12 J. B. Moore, 376, 4 Bing. 162.

(*k*) In Beckwith *v.* Corrall, 11 J. B. Moore, 335, the plaintiff was robbed of a pocket-book, containing, amongst other things, a bill of exchange. In advertising the loss he merely stated that the pocket-book contained "papers of no use to any person but the owner." The court said that the loser was bound to give notice of his loss as extensively as possible, but so far from having done so in that case, he had rather misled than assisted parties to whom the stolen note might be offered, by the deceptive terms of his notice. The jury having found the plaintiff's advertisement an improper one, the court refused to disturb the verdict. But when, in an action on a lost note, an inaccuracy in the advertisement was caused by information given to the plaintiff who could neither read nor write, by one of the defendants, the latter could not take advantage of the error. Lebleu *v.* Rutherford, 9 Rob. La. 95. In Cohen *v.* Morgan, 6 Dowl. & R. 8, A, having lost a bill of exchange, got a warrant from a magistrate to apprehend B for "feloniously stealing" the same, (language which A did not use in his complaint to the magistrate,) but it turned out to be no felony. Held, that B could not sustain case against A for maliciously procuring a warrant, because A's charge was not *wilfully* false.

(*l*) Snow *v.* Peacock, 3 Bing. 406, 11 J. B. Moore, 286; Strange *v.* Wigney, 4 Moore & P. 470, and the cases in note *s*, *infra*.

(*m*) De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385; Raphael *v.* Bank of England, 17 C. B. 161, 33 Eng. L. & Eq. 276.

(*n*) Strange *v.* Wigney, 4 Moore & P. 470, 6 Bing. 677. The jury having decided that the plaintiff had duly advertised her bill, a rule *nisi* was moved, on the ground that the steps taken by the plaintiff to make known her loss were not such as were calculated to give notice to commercial men, or to those who were likely to receive such an instrument. Having lost the bill in a hackney-coach, she immediately caused handbills, describing the property, and offering a reward for its restoration, to be printed and circulated at all the coach-stands and adjacent public houses, and on the same day

legal way of giving notice of the loss of a bill or note is through the public papers.(*o*)

Parol testimony has been admitted to prove that the lost bill of exchange in suit was duly advertised, without the production of the advertisement itself, or of the newspaper in which it was published.(*p*) But public notice not brought home to the buyer will not affect his title, for here, as in other cases of advertisement, the notice operates upon those only whom it reaches.(*q*) But a jury may draw the conclusion that the payor or buyer had seen the advertisement, from any evidence rendering it sufficiently probable; as his taking the paper, or being in the habit of reading it, or the like. And it has been intimated that due

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when the defendant took the bill put an advertisement to the like effect in the Morning Advertiser. It was urged that this single advertisement could not possibly have reached the defendant at the time he took the bill. The court, in refusing a new trial, said that the principal point was, whether the plaintiff had used due diligence in making her loss known. "It was insisted that the plaintiff ought to have advertised her loss. I told the jury, that, although that might be a very good method of making known a loss, yet that there was no law to compel a party to advertise; and that the whole circumstances of the case must be impartially weighed, to ascertain whether the defendant had fairly and honestly used means to make public the loss of the note."

(*o*) Civil Code, Art. 2258, 2259. "Nor does it appear that the loss was advertised in a public paper, which the law deems equally necessary to a recovery in all cases where a lost instrument is made the foundation of a suit or defence." Lewis *v.* Splane, 2 La. Ann. 754; New Orleans & C. Railroad Co. *v.* Armstrong, 2 La. Ann. 829.

(*p* Miller *v.* Webb, 8 La. 516.

(*q*) Lawson *v.* Weston, 4 Esp. 56; U. S. Bank *v.* Sill, 5 Conn. 106; Matthews *v.* Poythress, 4 Ga. 287; Beltzhoover *v.* Blackstock, 3 Watts, 20. In Lawson *v.* Weston, the person who *bona fide* disconnted a lost bill for the fraudulent finder, recovered upon it against the acceptor, although the latter had previously advertised the loss in the newspapers. Lord *Kenyon* said that the plaintiffs might or might not have seen the advertisement, and that it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount. In Beltzhoover *v.* Blackstock, the court said: "The publication in the gazette, with the evidence of one of the plaintiffs being a subscriber, that his paper was duly sent, and no complaint made of omission, is relied on as visiting the plaintiffs with notice of the defence which the defendants intended to make. But such a publication cannot be considered as affecting the plaintiff with direct notice of the contents of the advertisement, nor even as a circumstance for the jury to infer it. It would be of dangerous consequence to hold an advertisement in the gazette to be such an actual notice as to visit a party with all the consequences of full and express notice. . . . . In the present instance, the newspaper may not have been delivered to the party; if left at his abode, he may not have read it, or not till subsequently to the transaction it related to. It would be hard to subject a man to the consequences of *mala fides*, when perhaps he never had knowledge of the matter alleged." See also, Rowley *v.* Horne, 3 Bing. 2, where an advertisement for three years was held no notice.

diligence in advertising, and so forth, by the loser, may raise a presumption of knowledge on the part of one to be affected by it; and on this ground it was formerly held, that the loser of a note could not recover upon it, without having exercised due diligence in giving a public and accurate notice of its loss.(*r*) This question of diligence in notice is left to the jury.(*s*) It is, however, certain that the want of proper notice on the part of the loser will not excuse dishonesty on the part of the purchaser, though the negligence of the one might in general be an excuse for the negligence of the other. And since, also, the modern doctrine is that nothing but dishonesty on the part of the purchaser can invalidate his title to the lost note, the question of the loser's diligence in advertising has become of little importance, and the chief point is the holder's *bona fides*.(*t*)

(*r*) Beckwith *v.* Corrall, 11 J. B. Moore, 335. "*Per Curiam.* If, in this case, the plaintiff had used due diligence, and had given proper notice of the loss of the bill in question, the defendants might have been presumed to have been apprised of that fact. Where a person loses, whether by accident or robbery, a negotiable security, he should, before he can be entitled to recover it in an action of this nature, be prepared to show that he has done all that could be required on his part to make known his loss, and that the party who has received it has, in doing so, failed in observing due caution."

(*s*) Beckwith *v.* Corrall, 11 J. B. Moore, 335; Strange *v.* Wigney, 4 Moore & P. 470, 6 Bing. 677; Snow *v.* Peacock, 11 J. B. Moore, 286, 3 Bing. 406; Easley *v.* Crockford, 3 Moore & S. 700, 10 Bing. 243; Backhouse *v.* Harrison, 5 B. & Ad. 1098, 3 Nev. & M. 188. In the case first quoted, the jury found the want of advertisement fatal negligence, but immaterial in all the others.

(*t*) In Snow *v.* Peacock, 11 J. B. Moore, 286, *Best*, C. J. said: "I think I should have been well warranted in putting this case to the jury simply as one of *mala fides*. On the loss of a bank-note, or bill payable to bearer, immediate notice of the loss should be given to the public, in the manner most likely to prevent persons who would otherwise be ignorant of the fact from taking it; but even if the lost note be not duly advertised, still, if a person receive it under circumstances reasonably calculated to induce a belief that he knew the holder to have possessed himself of it improperly, the loser is entitled to recover . . . . . for the negligence of the one is no excuse for the dishonesty of the other, though it might be for the mere negligence. In the latter case, the maxim that has been referred to at the bar, *potior est conditio possidentis*, might apply." In Strange *v.* Wigney, note *n*, *ante*, the jury decided that the plaintiff had properly advertised her lost bill. A rule *nisi* was moved, on the ground that the advertisement was insufficient. But the rule was refused. *Bosanquet*, J. said: "I am not prepared to say, that, because there happens to have been some degree of negligence on the part of the loser of a note, he is therefore to be precluded from recovering it from a person to whose hands it has come, and who has received it without due caution or inquiry." In Easley *v.* Crockford, 3 Moore & S. 700, *Tindal*, C. J. said: "If, indeed, the plaintiff had been guilty of negligence in not duly advertising and giving notice of the robbery, that might give the defendant an opportunity of showing that he had fairly and honestly acquired the note. But it appears to me that the defendant

Hence, it has been held in this country, also, that though public notice of the loss or theft of a note is proper and commendable, it is not essential to sustain the loser's case, provided it be in other respects maintainable.(*u*) But under the Louisiana Code, as we have seen,(*v*) notice through the public prints is a prerequisite to recovery upon a lost draft or note.

SECTION II.

OF DEMAND OF PAYMENT.

It must be remembered that the owner of a lost note or bill should make a regular and formal application for payment, when the note falls due. For, as it has been well said, the loss of a note does not materially change the contract entered into by its several parties: its only effect is to give the parties called upon to pay a right to demand security against any different liability than that which they originally assumed.(*w*) The rule and the reason apply also, though the note should be destroyed.(*x*)

Accordingly, as has been stated before, the owner of a lost note must make, as far as possible, the same presentment and demand,(*y*) at the proper time and place,(*z*) and give the same

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cannot set up the prior negligence of the plaintiff, in order to excuse his own." In that case, the plaintiff had duly advertised. In Backhouse *v.* Harrison, 5 B. & Ad. 1098, the jury found that the plaintiff had taken certain lost bills *bona fide*, but without due caution, and also that the defendant had not used due diligence in making the loss known. *Alderson*, J. then directed the jury to find a verdict for the defendant, but reserved liberty to the plaintiff to move to enter a verdict, "if the court should be of opinion that the defendant, having been guilty of the first negligence, was thereby estopped from setting up the negligence of the plaintiff." The case was decided upon the point of the plaintiff's *mala fides*, but Lord *Denman* said: "I think the omission of the defendant here to advertise the loss of bills which had gone to the bottom of a canal was not such negligence as to deprive him of a right of defence which he otherwise might have had."

(*u*) Matthews *v.* Poythress, 4 Ga. 287, 307.

(*v*) *Supra*, p. 258, note *o*.

(*w*) Edwards, Bills, 305.

(*x*) Thackray *v.* Blackett, 3 Camp. 164.

(*y*) Pothier du Contrat de Change, 145. See on this subject *ante*.

(*z*) Streater *v.* Bank of Cape Fear, 2 Jones Eq., N. Car., 31. In this case, the defendant's note was made payable at their branch bank. It was cut into halves, one

notice of dishonor for non-acceptance (*a*) and non-payment,(*b*) with the same protest, and this by the aid of a copy, if practicable,(*c*) — though formerly, wherever a new bill could be had of the drawer, protest upon a copy was not admissible,(*d*) — with all other precautions that he would employ if the note were in his manual possession. In short, *mutatis mutandis*, the parties should proceed, so far as practicable, precisely as if the note were in existence, changing the mode, indeed, of demand and notice, so far as necessary, but not omitting them.

A failure in these duties may bar the owner's recovery from those who would otherwise be liable; for it is obvious that prior parties, from want of notice of dishonor, may have been prevented from pursuing their respective remedies against the parties liable to them.

This necessity of notice is as binding in equity as at law; (*e*) and the loss of a note is no more excuse than the bankruptcy or insolvency of its parties,(*f*) for a failure to give notice of dishonor. Although, as we have said, it may be advisable in many cases to make presentment, demand, and protest upon a copy, there seems to be no rule requiring a copy. But a regular presentment must be made, since it is evident that in some cases the maker would be willing to waive the objection to the non-production of the note, and in others, would pay upon receiving full indemnity against a future claim on the same note.(*g*)

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half lost, and the other presented for payment at the counter of the mother-bank at Wilmington. No demand was made of the branch bank, and payment was refused at the Wilmington bank. It was held, that a bill in equity would not lie against the latter, because no demand of payment had been made at the place designated.

(*a*) Pardessus, 408.

(*b*) Thackray *v.* Blackett, 3 Camp. 164; Smith *v.* Rockwell, 2 Hill, 482.

(*c*) Kyd, Bills, 3d ed., 139; Molloy, 281; Beawes, Bills, 182, 185; Dehers *v.* Harriot, 1 Show. 163. Demand of payment of a lost note on a copy is sufficient, and satisfies the usual averment of due presentment. Hinsdale *v.* Miles, 5 Conn. 331.

(*d*) Dehers *v.* Harriot, 1 Show. 163; Glen on Bills, 199.

(*e*) Streater *v.* Bank of Cape Fear, 2 Jones, Eq., N. Car. 31.

(*f*) See *supra*, Vol. I. p. 528.

(*g*) But in Aborn *v.* Bosworth, 1 R. I. 401, it was decided, that the fact that a bill is lost *is* an excuse for delay in making a demand upon the drawee, but for no more than reasonable delay. The bill was dated Apalachicola, March 4, 1847, drawn upon John Hart of Alabama, and payable to Aborn or order, who seems to have resided in Rhode Island. In its transmission to the agent of J. A. Aborn the bill was lost on board a steamer. Demand was made upon the drawee June 17, 1847, and payment refused. No protest was made for non-payment, nor did it appear conclusively that the drawer

When the owner of a lost note demands payment of it, he should be ready to tender to the payor sufficient indemnity in some form against any future claim by a finder or holder, upon the lost instrument. For, ordinarily, whenever a demand of payment is made, it must be accompanied with the note, to be delivered upon payment. And the payor is usually not compelled to pay, unless the instrument, which is his voucher, is produced and handed to him; since otherwise he might be again called upon to pay the same note, and if it were lost, a *bona fide* transferee for value would have an indisputable claim upon him for its amount.

But a tender of satisfactory indemnity will excuse the production of the note, and make the demand of payment valid.(*h*) It is obvious that such a security can seldom be so absolutely certain as the delivery of the note itself; but still the rule is the only one that can be devised, and is perfectly established.(*i*)

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had any effects in the hands of the drawee, or was authorized to draw upon him. *Greene*, C. J. charged the jury, that the want of protest discharged the drawer, unless he had no effects in the hands of the drawee, and no authority to draw; thus indicating that a protest is still necessary in the case of lost paper. This we think is law, for the plain reason that it may be made on a copy.

(*h*) Freeman *v.* Boynton, 7 Mass. 483, 486, per *Parker*, J.: "Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt; for otherwise the debtor may well refuse to pay, on the ground that he has a right to have his obligation or contract, or to see it cancelled, when he is called upon to discharge it. And this rule will especially apply to negotiable securities, which may be legally transferred to another, at the very time the original payee makes his demand of payment. This rule may admit of exceptions; as where the security may be lost; in which case a tender of sufficient indemnity would make the demand valid, without producing the security."

(*i*) "When any one misses his accepted bill, whether payable directly to the possessor or to his order, or if such a one receive advice from his correspondent that he has remitted *such a sum, in such and such a bill*, &c., though on opening his letter he finds the bill is not enclosed, or if the letter and bill have miscarried, of whose forwarding he has advice by the succeeding post, and finds that the day of payment draws so near as to hinder his getting other bills in room of the lost one, he may, when it comes due, demand payment upon his letter of advice, with the tender of security to free and discharge the acceptor from any future demands of that sum, by virtue of the lost bill; and if the acceptor will not pay on those terms, he may be protested against for re-exchange and charges," on the ground that he wilfully occasioned them. Beawes, Bills of Exchange, 182, 185; Marius, 80. In this country we have no law, like the statute of Wm. III., quoted in Beawes, 185, providing for a resort to the drawer for a copy of a lost bill. Thomson, Bills, p. 322, controverts the opinion of Marius, that, if the acceptor refuses payment on offer of full indemnity, he will be liable in all damages, and adds: "It is doubtful whether any of the parties could be obliged to pay,

This tender of indemnity should be made to all the parties on lost bills of whom payment is demanded, whether maker, acceptor, or indorser. For since the maker or acceptor is not compelled to pay without indemnity offered, payment should not be demanded of the indorser till he has the means of immediate recourse against his principal or his prior indorsers. Upon receiving prompt security, he may be able to pay the demand at any time after notice, and look to the maker. But if the indorser should sustain any injury by reason of the owner's neglect in this particular, an application to equity to enforce payment against such indorser would, we think, be refused.

It has been said, accordingly, that the holder should take the necessary steps with all reasonable diligence to secure a speedy resort to that court in behalf of the surety; as the consequences of delay would justly fall upon the holder, so far as the indorser or any other party standing in that relation upon the paper is concerned.(*j*)

SECTION III.

RIGHTS AND LIABILITIES OF FINDER.

HAVING considered so far the *duties* of the owner upon the loss or theft of his note, we will turn to the respective rights and liabilities of the finder, the assignee of the finder, and the loser. The *finder* of a lost bill or note has no title to it whatsoever, as against the real owner. Accordingly, trover may be maintained against him by the owner for the note itself, or for its amount, for in this respect, mercantile paper is like any other property.(*k*)

But to maintain this action, the note must be traced, and its identity ascertained; the question of identity being left with the

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until the loss was proved in an action, and security found against its reappearance."

(*j*) Smith *v.* Rockwell, 2 Hill, 482.

(*k*) Anonymous, 1 Salk. 126, 3 Salk. 71; Lucas *v.* Haynes, 1 Salk. 130, 2 Ld. Raym. 871 · Greenstreet *v.* Carr, 1 Camp. 551; Adkins *v.* Blake, 2 J. J. Marsh, 40.

jury.(*l*) It has also been held, that, in such cases, it is not enough for the plaintiff to prove his own title, and that afterwards the defendant converted it, but so much suspicion must be thrown upon his conduct in the transfer, as to render it necessary for him to prove consideration. For the legal presumption is that the holder of a note is not its finder, but its transferee for value.(*m*) But when there is no question as to the conversion by the finder, the loser may recover without the strongest proof of his own title.(*n*)

The question may also be asked, how far a finder of bills or coin, who has used them, is liable to the owner for their value. We should say decidedly, that he is fully liable, unless he can show that he did all that could reasonably be asked, by the use of proper means, and by delay, to preserve them for the owner; and only when all these means were unavailing, had used them.

And we should say further, that even then he would be clearly liable to the owner, but the value of the services or expense incurred by finding, or perhaps in trying to find an owner, should be deducted from the amount of the note. The general rule must be, that the finder should be liable to the owner, so far as he could be made so without being prejudiced by the finding and proper use of the bills or coins, and no further.

The finder, however, has no lien in any case,(*o*) (as in the civil law,) but a finder of other property than bills, as is held by high authorities, may maintain assumpsit for his reasonable and proper expenses on account of the thing found.(*p*) If so, in an

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(*l*) Burn *v.* Morris, 2 Cromp. & M. 579.

(*m*) King *v.* Milsom, 2 Camp. 5.

(*n*) Greenstreet *v.* Carr, 1 Camp. 551; Holiday *v.* Sigil, 2 Car. & P. 176. It was proved in Greenstreet *v.* Carr, that the defendant had picked up a pocket-book containing the notes; and the only question raised was, whether there was sufficient evidence that they were the property of the plaintiffs. A banker's clerk swore that he had delivered those notes in payment of a check payable to "R. Greenstreet or bearer"; but he could not state to whom. This was held to be *prima facie* evidence of property, and plaintiff recovered. In Holiday *v.* Sigil, *Abbott*, C. J. said to the jury: "The question to be considered is, whether you are satisfied that the plaintiff lost this note, and that the defendant found it; for if you are, the plaintiff is entitled to your verdict. I should observe that it is scarcely possible for a plaintiff, when his property is stolen, or accidentally lost, to prove the loss by direct evidence; and therefore, that must in almost all cases be made out by circumstances."

(*o*) Binstead *v.* Buck, 2 W. Bl. 1117; Nicholson *v.* Chapman, 2 H. Bl. 254.

(*p*) In Reeder *v.* Anderson, 4 Dana, 193, the court said: "It seems to us that there is an implied request from the owner to all other persons, to endeavor to secure to him

action upon lost bills, such expenses would probably be set off against the owner's claim. We do not perceive why a greater deduction than this should be made, for the money has been used by the finder, and is plainly so much had and received to the use of the owner.

Where no question is made as to the expenses of the finder, he is liable for the full value of the bill which he has sold to a purchaser, or received payment of from the acceptor.(*q*) And this is true, though payment of full value, in due course of business, to a finder or thief, vests complete property in the purchaser or discounter who takes the bill without knowledge of the loss or theft.(*r*)

The finder cannot sue the acceptor or maker for the amount of the note, but he probably has enough property in it as constructive bailee, to sue anybody who tortiously converts it, except the owner; but this point, so far as notes and bills are concerned, has not been adjudicated.

The *thief* of a stolen note has obviously no property or title in it himself,(*s*) although one ignorant of the theft may derive title from him. A *bailee* who tortiously converts the note or bill left in his keeping has no title to it, and may be sued in trover, or in case for money had and received.(*t*) And it makes no difference, in such cases, whether the owner was himself the bailor, or whether his clerk or agent performed the act of bailment and assisted the detention.

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lost property, which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) *indemnify* any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property." See also *dictum* in Nicholson *v.* Chapman, 2 H. Bl 254.

(*q*) Holiday *v.* Sigil, 2 Car. & P. 176.

(*r*) See *post*, p. 268, *et seq.*

(*s*) Martin *v.* Bank of U. S., 4 Wash. C. C. 253.

(*t*) Fancourt *v.* Bull, 1 Bing. N. C. 681; Knight *v.* Legh, 4 Bing. 589; Paterson *v.* Hardacre, 4 Taunt. 114; Haynes *v.* Foster, 4 Tyrw. 65; Cranch *v.* White, 1 Bing. N. C. 414; Bleaden *v.* Charles, 7 Bing. 246; Evans *v.* Kymer, 1 B. & Ad. 528; Marston *v.* Allen, 8 M. & W. 494; Palmer *v.* Richards, 1 Eng. L. & Eq. 529; Garlock *v.* Geortner, 7 Wend. 198. In Bleaden *v.* Charles, A, the plaintiff's debtor, deposited with the defendant, as a security for goods sold, a bill accepted by plaintiff, for which plaintiff had received no value. A afterwards paid for the goods, and asked for the restoration of the bill; but the defendant indorsed it for value to B, who sued the plaintiff and recovered. Held, that the plaintiff might recover the amount of the bill in an action for money paid to the use of the defendant, but not the costs of the action by B against plaintiff. See Collins *v.* Martin, 1 Bos. & P. 648.

On similar ground trover will lie by the *bona fide* holder for full value, who must be the real owner, against a banker, who, receiving the bill to be cashed, detains it for the reason that it has been stolen.(*v*) The same thing is true if the maker of a note wrongfully seizes and detains it when presented to him for payment.(*w*) So, if a bill be lost by the drawee, to whom it has been delivered for acceptance, the payee may have trover for its recovery.(*x*)

The *mala fide assignee* of the finder, or the robber of negotiable paper, acquires no title to it as against the owner, or any party legally claiming under him. And, speaking generally, whoever had knowledge of the failure of his assignor's title in a note, takes no stronger title therein himself. Hence, a lost or stolen note may always be pursued into the hands of its *mala fide* transferee,(*y*) either by trover or assumpsit, or by an action for money had and received.(*z*) But the notes must be traced, and

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(*v*) De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385; Miller *v.* Race, 1 Burr. 452.

(*w*) Gray *v.* Kernahan, 4 Const. R. 65; Knight *v.* Legh, 4 Bing. 589; Reynolds *v.* French, 8 Vt. 85; Edgell *v.* Stanford, 6 Vt. 551. With regard to dispensing with notice to produce, in suits against fraudulent or wrongful possessors of notes, see *post*, p. 292, note *s*.

(*x*) Lucas *v.* Haynes, 1 Salk. 130, 2 Ld. Raym. 871.

(*y*) Clarke *v.* Shee, 1 Cowp. 197; s. c. *nom.* Clarke *v.* Johnson, Lofft, 756; Burn *v.* Morris, 2 Cromp. & M. 579, 4 Tyrw. 485; Hinton's Case, 2 Show. 235; Fancourt *v.* Bull, 1 Bing. N. C. 681; Cranch *v.* White, id. 414; Downe *v.* Halling, 2 Car. & P. 11, 2 Dow. & R. 455; Snow *v.* Leatham, 2 Car. & P. 314; Lovell *v.* Martin, 4 Taunt. 799; Heath *v.* Sansom, 2 B. & Ad. 291; Smith *v.* Braine, 16 Q. B. 244; Mason *v.* Waite, 17 Mass. 560; Kingman *v.* Pierce, id. 247; Patton *v.* State Bank, 2 Nott & McC. 464; Henderson *v.* Irby, 1 Speers, 43; Munson *v.* Cheesborough, 6 Blackf. 17; Small *v.* Smith, 1 Denio, 583. In Hinton's case (1682), *Pemberton*, C. J. said that, if the holder of a bill "come to be bearer by casualty or knavery, he shall not have the benefit of it." In Clarke *v.* Shee, Lord Mansfield declared, "where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property." As to what is *mala fides*, and the evidence of negligence, see *post*, p. 268, *et seq.*

(*z*) "It is true, in such a case, trover would have been the proper action; and, perhaps, would have been the better action in this case, but for the difficulty of identifying bank-notes. We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money; and as to any want of privity, or any implied promise, the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over." Per *Parker*, C. J., Mason *v.* Waite, 17 Mass. 560

their identity thoroughly established.(*a*) And it makes no difference whether the assignee is a discounter or a trader, that is, whether he gave in exchange cash or merchandise.

It is only the innocent taker of bank-bills, lost or stolen, who acquires title to them. And it may be a question, whether a receiver who knew or believed that the bills had been found, and that the finder had done what he could to restore them, and now honestly used them, would be regarded as an innocent taker under this rule of law.

We do not know that this question has passed under adjudication. We should say, however, on principle, that whether the payment were made in bills or in coin, a receiver who had knowledge that the payor had found the bills or coin would not have all the rights of a *bona fide* holder, but would be liable for their value to the actual owner, in the same manner in which the finder would have been, had he retained them in his own hands.

In the case of an ordinary bill, the reason for this conclusion would be still stronger, because the finder might at once resort to the original parties on the face of the bill, and through them trace out the owner; and until this was accomplished, the finder could not be said to have made all possible search for the loser.

It has been held, that although the allowance and approval of a negotiable instrument, as a claim against the estate of the maker, will not destroy its negotiability, yet it seems it would subject it when assigned, to defences against it in the hands of the assignor; and if lost or stolen, or if it have otherwise come unlawfully into the possession of a holder, it is subject to a recovery from his hands, or from any holder for value, by the true owner.(*b*)

The *bona fide* assignee for value of lost or stolen negotiable notes and checks, has a valid and complete title in them, even though his transferrer had no title whatever. This transferrer

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(*a*) "If their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example that he should; but otherwise, if they cannot be followed and identified, because there it might be inconvenient, and open a door to fraud. Miller *v.* Race, 1 Burr. 452; and in Golightly *v.* Reynolds, the identity was traced through different hands and shops." Clarke *v.* Shee, 1 Cowp. 197; Burn *v.* Morris, 2 Cromp. & M. 579; Mason *v.* Waite, 17 Mass. 560, *ante*, p. 266, note *z*.

(*b*) Weathered *v.* Smith, 9 Texas, 622.

may be the finder, the thief, the bailee,(*c*) or the tortious agent or factor (*d*) of the owner. Such a holder for value, being without knowledge of the loss, theft, or fraud when he takes the paper, may recover the amount from the acceptor or other parties liable, and the loser has no remedy whatever against the holder. This rule excepts negotiable paper from the universal principle with regard to other property, namely, that only he who has a title himself to a personal chattel can convey one to another.(*e*) The leading case which first (*f*) decisively laid down this doctrine was decided in the year 1798.(*g*) A bank-note, payable to bearer, was stolen from the mail, and on the day after came into the hands of the plaintiff for a full and valuable consideration, and in the usual course of business, and without any notice or knowledge of the bank-note being taken out of the mail. It was held, that the plaintiff might recover the note from a clerk in the bank, who had detained the note when presented for payment. Lord Mansfield said, that "he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case, upon the general course of business, and from the consequences to trade and commerce, which would be much incommoded by a contrary determination." This cogent reason of the "general course of business" is reiterated by Lord Mansfield, it being precisely the reason urged by Lord

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(*c*) See cases quoted *supra*, p. 265, note *t*.

(*d*) Johnson *v.* Windle, 3 Bing. N. C. 225, 2 Hodges, 202; Wookey *v.* Pole, 4 B. & Ald. 1, 15; Bay *v.* Coddington, 5 Johns. Ch. 54; Coddington *v.* Bay, 20 Johns. 637; Greneaux *v.* Wheeler, 6 Texas, 515. So the assignor may be the curator of an estate. McKinney *v.* Beeson, 14 La. 255.

(*e*) According to the same rule, it has been held, that trover will not lie against the *bona fide* holder of an annuity ticket, which had been lost by or stolen from a former proprietor, if such ticket has been regularly transferred to such holder, pursuant to the statute by which it was issued. Devallar *v.* Herring, 9 Mod. 44. See Lee *v.* Newsam, Dow. & R. N. P. 50.

(*f*) In Hinton's Case, 2 Show. 235, which was an action against the drawer of a bill payable to bearer, it was held that the plaintiff "must intitle himself to it on a valuable consideration, though among bankers they never make indorsements in such case; for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." In Anonymous, 1 Salk. 126, a bank-bill payable to A or bearer, being given to A and lost, was found by a stranger, and transferred for value to C. *Holt*, C. J. held that "A cannot maintain trover against C by reason of the course of trade, which creates a property in the assignee or bearer." This was in the year 1698.

(*g*) Miller *v.* Race, 1 Burr. 452, 1 Smith, Lead. Cas. 250.

Holt,(*h*) sixty years before. It was declared by Lord Mansfield, that, if there had been any collusion, or any circumstances of unfair dealing, the case would have been otherwise. His Lordship adds, that a bank-bill "never shall be followed into the hands of a person who *bona fide* took it in the course of currency, and in the way of his business," for "a bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured." Lord Mansfield's doctrine in this case has been adopted in numerous other cases, both in England and in this country.(*i*)

The title of a *bona fide* holder for value of a bill acquired before it was due being thus absolutely established, the next great question obviously was, what shall be proof or presumptive proof of *mala fides*. The earlier cases(*j*) seem to have negatively implied, without finding it necessary to decide the question, that undue negligence in taking a suspicious note would

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(*h*) Anonymous, 1 Salk. 126.

(*i*) The next case after Miller *v.* Race, 1 Burr. 452, was Grant *v.* Vaughan (year 1764), 3 Burr. 1516, 1 W. Bl. 485, in which the plaintiff was allowed to recover, because he took a lost note "fairly and *bona fide* in the course of trade, and even with the greatest caution: he made inquiry about it, and then gave the change for it. And there is not the least imputation or pretence of suspicion, that he had any notice of its being a lost note." Next, in Peacock *v.* Rhodes (year 1781), 2 Doug. 633, Lord *Mansfield* affirmed his two former decisions, and said: "The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case (which is a hard one, but has been determined), of a note for money won at play." Lawson *v.* Weston, 4 Esp. 56, decided in 1801, carried the doctrine of Miller *v.* Race to a great length. In Lowndes *v.* Anderson, 13 East, 130, 1 Rose, 99 (decided 1810), Lord *Ellenborough* said: "It would be a grievous inconvenience if bank-notes could be followed in the manner now attempted through the hands of *bona fide* holders for a valuable consideration, without notice." The rest of the court concurred. In Solomons *v.* Bank of England, 13 East, 135, note, the same doctrine was reiterated. But when suspicious circumstances in the transfer were shown, Lord *Kenyon* left it to the jury to say whether such evidence proved the plaintiff privy to the original fraud. The doctrine of Miller *v* Race was also applied to a transfer obtained by forgery, in Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390. And see Wookey *v.* Pole, 4 B. & Ald. 1, 15. In a late case, when an agreement was made to the acceptor, to deliver up certain bills drawn in sets, and the first set only was given up, the other two being accidentally miscarried, it was held, that the agreement was not performed, because the defendant would still be liable to the *bona fide* holder for the value of the missing sets. Kearney *v.* West Granada, &c. Mining Co., 1 H. & N. 412, 38 Eng. L. & Eq. 327.

(*j*) See the cases in note *i*.

defeat the receiver's title. But a contrary doctrine was laid down by Lord Kenyon,(*k*) namely, that it is not enough to prove against the receiver for value of negotiable paper that he has not been properly diligent in inquiring the title of his transferrer. Actual *mala fides* will alone destroy his title. The next step was taken by Lord Tenterden, in a case to which we have elsewhere referred; he laid down the rule, that the title of the holder of negotiable paper would not be protected, where he had acquired it under circumstances which ought to have excited the suspicions of an ordinarily prudent and careful man.(*l*)

(*k*) Lawson *v.* Weston, 4 Esp. 56. The bill having been lost and advertised in the newspapers, was discounted by the plaintiff, a banker, for a stranger, who was desired to put his name on the back of the bill, and did so. No inquiry was made as to his ownership. Accordingly, the counsel for the defendants, the acceptors, insisted that "a banker, or any other, should not discount a bill for a person unknown without using diligence to inquire into the circumstances, as well respecting the bill as of the person who offered to discount it." But Lord *Kenyon* said: "If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10.000." Compare the same judge's opinion in Solomons *v.* Bank of England, 3 East, 135, note, *supra*, note *i*.

(*l*) Gill *v.* Cubitt, 3 B. & C. 466, 5 Dow. & R. 324, 1 Car. & P. 487. The bill was stolen during the night, and discounted next morning by a person whose name was unknown to the broker, but whose features were known, and the latter discounted the bill as usual without further inquiries. *Abbott*, C. J. asked the jury whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. If so, then, though he gave its full value for it, they must find a verdict against him. They found for the defendant. In overruling Lawson *v.* Weston, 4 Esp. 56, *Abbott*, C. J. said: "It appears to me to be for the interest of commerce, that no person should take a security of this kind from another, without using reasonable caution." *Bayley*, J. said: "If there was not due caution used, the plaintiff has not discounted this bill in the usual and ordinary course of business. . . . . I consider it was parcel of the *bona fides* whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which trade is conducted, a party ought to ask. . . . . A party cannot in law be considered to act *bona fide*, or with due caution and due diligence, if he takes a bill of exchange from a person whose features alone he knows, without knowing what his name is, where he lives, or whether he is a person with whom he has been in the habit of trading." *Holroyd*, J. said: If the discounter "takes it merely because it is drawn upon a good acceptor, then he takes it at a risk (or what ought, in the contemplation of a reasonable man, to be a risk), whether the bill be stolen or not: he takes it at his peril. I cannot agree with the doctrine laid down in

The question of negligence was left with the jury, as before.(*m*) Lord Tenterden's rule appears to have proceeded on the ground that it would encourage theft to say that the receiver of a note or bill is not bound to inquire about it before taking it. Accordingly, it was held, that, though a discounter's good faith was unquestionable, yet if he were guilty of undue want of caution in taking it, he could not sue for its amount himself, nor defend in the loser's suit for its recovery.(*n*) However, the same degree of caution was not required in all cases, — a less degree being expected in taking a note on a bet at a race-course than in taking

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Lawson *v.* Weston." The verdict was affirmed. Gill *v.* Cubitt, decided in 1824, was adopted in Egan *v.* Threlfall, 5 Dow. & R. 326, note *a* ; Down *v.* Halling, 4 B. & C. 330, 6 Dow. & R. 455, 2 Car. & P. 11 ; Snow *v.* Peacock, 3 Bing. 406, 11 J. B. Moore, 286, 2 Car. & P. 215 ; Beckwith *v.* Corrall, 3 Bing. 444, 2 Car. & P. 261, 11 J. B. Moore, 335 ; Snow *v.* Sadler, 11 J. B. Moore, 506, 3 Bing. 610 ; Haynes *v.* Foster, 4 Tyrw. 65 ; Strange *v.* Wigney, 4 Moore & P. 470, 6 Bing. 677 ; Slater *v.* West, 1 Dans. & L. 15, 3 Car. & P. 325 ; Snow *v.* Leatham, 2 Car. & P. 314 ; Easley *v.* Crockford, 10 Bing. 243 ; De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385. In Down *v.* Halling, *Abbott*, C. J. told the jury there was no evidence that the defendants had taken the check fraudulently, but the question was, whether they had not acted negligently. The jury thereupon found for the plaintiffs, and a new trial was refused in bank. In Snow *v.* Peacock, *Best*, C. J. said : "I thought, and told the jury, that it could not impede the circulation of bank-notes to require every man that dealt with them to use a proper degree of caution and circumspection. . . . . No other caution is required than that which is necessary to ascertain that a man who tenders a bank-note of large value to a person to whom he is an utter stranger is not likely to be a thief or the agent of thieves." *Gaselee*, J. said : "I agree with the court that this case was properly left to the jury, on the question whether due diligence or due caution had been used, without its being necessary to go further, and prove that there had been *mala fides*." In Slater *v.* West, Lord *Tenterden*, in summing up, said : "If the manner in which the bill was offered by a perfect stranger, making verbal representations, and desiring the goods to be sent to such a place, but betraying no consciousness of suspicion, and buying to a larger amount than the amount of the bill, leads you to conclude that the plaintiffs ought to have had their suspicions excited, then I am of opinion that you should find your verdict for the defendant." Verdict for the defendant. In this case, decided in 1828, the bill was taken in payment for goods, and hence the doctrine has been considered extreme. As to what is proper caution for bankers in appropriating notes, see Cunliffe *v.* Booth, 3 Bing. N. C. 821, 5 Scott, 17.

(*m*) But the loser of a check, lost after it bears date, having proved his own title and the defendant's negligence, may recover, though he gives no evidence of how he lost it, or of how it got out of his possession. Down *v.* Halling, 2 Car. & P. 11.

(*n*) Compare with Lord Tenterden's doctrine of negligence the case of Hatch *v.* Searles, 31 Eng. L & Eq. 219, where, in a suit for administration, a claim was made by the holder of a bill ; but it being proved that the holder, who was indorsee of the bill, was aware of the fact of the acceptance being in blank, he was taken to have had as full knowledge of the circumstances of the origin of the bill as he might have acquired if he had made proper inquiry.

it from a tradesman.(*o*) So the magnitude of the note will affect the question of diligence, more carelessness being excusable in taking a small, than in taking a large note.(*p*)

The next change in the English doctrine took place under Lord Denman, by whom it was determined, that *gross* negligence in the transfer would destroy the title of one who takes lost or stolen negotiable paper, but nothing less than gross negligence.(*q*) This rule was adopted because it was properly thought that the former rule impeded the free circulation of negotiable paper, and was contrary to the spirit of the law-merchant. Besides, it was somewhat difficult to define what "reasonble caution" in such matters was, and it became a dangerous question to leave to the jury. A fourth and final step of the English courts was to make even gross negligence of the purchaser or discounter no defence in his action for the amount. Lord Tenterden's doctrine is therefore decidedly overruled, and the law, as it was before that decision was announced, is re-established.(*r*)

(*o*) Snow *v.* Sadler, 11 J. B. Moore, 506, 3 Bing. 610.

(*p*) Miller *v.* Race, 1 Burr. 452; Snow *v.* Sadler, *supra*, note *o*; Easley *v.* Crockford, 10 Bing. 243; Snow *v.* Peacock, 3 Bing. 406, *supra*, note *l*. But, *contra*, see Lawson *v.* Weston, 4 Esp. 56, where Lord Kenyon said: "The magnitude of the bill has been pressed as a ground of suspicion by the defendants' counsel; I do not feel it of such importance." But he was speaking of a special case.

(*q*) Crook *v.* Jadis, 5 B. & Ad. 909, 3 Nev. & M. 257; Backhouse *v.* Harrison, 5 B. & Ad. 1098, 3 Nev. & M. 188; Foster *v.* Pearson, 5 Tyrw. 255, 1 Cromp. M. & R. 849; Bridger *v.* Heath, Chitty, 9th ed., 253, note *m*. In Crook *v.* Jadis, Lord *Denman* told the jury to find for the plaintiff, unless he had been guilty of gross negligence in taking the bill, and said, on the motion for a new trial: "I used the expression gross negligence advisedly." *Littledale*, J. said: "There must be gross negligence, *at least*, in a case like the present, to deprive a party of his right to recover on a bill of exchange." *Taunton*, J. said: "I cannot estimate the degree of care which a prudent man should take. The question whether the plaintiff was guilty of gross negligence was more definite and appropriate." *Patteson*, J. concurred, and said: "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." In Backhouse *v.* Harrison, the jury found, upon questions specially submitted, that the plaintiff took the bills *bona fide*, but under such circumstances that a reasonably cautious person would have refused them. The whole court affirmed the distinction, and no gross negligence being proved against him, but only a censurable want of care, the plaintiff recovered. The same doctrine was held in Foster *v.* Pearson, but the point was *obiter*, and was only suggested as a *semble*. A fourth case was Bridger *v.* Heath, *supra*.

(*r*) Foster *v.* Pearson, and Stephens *v.* Foster, 5 Tyrw. 255, 1 Cromp. M. & R. 849; Goodman *v.* Harvey, 4 A. & E. 870, 6 Nev. & M. 372; Uther *v.* Rich, 10 A. & E. 784; Arbouin *v.* Anderson, 1 Q. B. 498; Bank of Bengal *v.* Fagan 7 Moore, P. C. 61, 72; Bank of Bengal *v.* Macleod, id. 35; Raphael *v.* Bank of Eng., 17 C. B. 161, 33 Eng. L.

"We have shaken off," said Lord Denman, "the last remnant of the contrary doctrine." Indeed, the last case upon the point seems to have gone considerably beyond what was contemplated even by Lord Mansfield.(*s*)

& Eq. 276. In Foster *v.* Pearson, *Parke*, B. had said: "If the defendants took the bills for value, and honestly and with due care and caution, in the ordinary course of business (and even that is probably an unnecessary qualification), they would have a good title to hold them." This was in 1835. But the modern doctrine was first clearly laid down in Goodman *v.* Harvey, in 1836. Lord *Denman*, at *nisi prius*, had told the jury that the plaintiff, in taking a bill with the notarial protest written on it, had been guilty of gross negligence, for he had received it, "with a death-wound apparent on it," and therefore took the bill with no title at all. A nonsuit being entered, a rule *nisi* was moved, argued, and granted; and in bank, Lord *Denman* delivered the opinion thus: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith. The rule must be absolute." *Littledale*, *Patteson*, and *Coleridge*, JJ. concurred. In Uther *v.* Rich, Lord *Denman* said: "With respect to the doctrine laid down in Gill *v.* Cubitt and other cases, we adhere to the more recent decisions, and to what is said in Goodman *v.* Harvey, that gross negligence alone would not be a sufficient answer; that it may be evidence of *mala fides*, but is not the same thing" In Arbouin *v.* Anderson (1841) his Lordship pronounced Goodman *v.* Harvey, "the law now prevailing," and held that honesty was implied *prima facie* by possession, and that, to meet the inference so raised, fraud, felony, or some such matter, must be proved. In Bank of Bengal *v.* Fagan, 7 Moore, P. C. 61, Lord *Brougham* said that "it may be taken as established, that, whatever may have been the law laid down in Gill *v.* Cubitt, and Down *v.* Halling, and one or two other cases, and not abandoned, at least as far as the language went which the court used in some subsequent cases, their doctrine is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." He adds: "I cited the cases of Gill *v.* Cubitt and Down *v.* Halling, as having gone far to overrule Lawson *v.* Weston, 4 Esp. 56. These cases are no longer law, and Lord *Kenyon's* opinion is set up and supported by all the lawyers." Compare with these the analogous cases of Marston *v.* Allen, 8 M. & W. 494; Masters *v.* Ibberson, 8 C. B. 100.

(*s*) In 3 Campbell's Lives of the Chief Justices, 310, speaking of Lord Tenterden, the author remarks, that he had a very indifferent opinion of human nature, and was prone to suspect fraud, and he established accordingly the rule, that a holder of a note which had been lost or stolen could not maintain an action upon it if the jury should think he took it under circumstances which ought to have excited the suspicion of a prudent man. Lord Campbell, after stating that the new rule was universally adopted, says: "But the rule died with its author. It was soon much carped at; some judges said that fraud and gross negligence were terms known to the law, but of 'the circumstances which ought to excite suspicion,' there was no definition in Coke or in Cowell; and the complaint of bill-brokers resounded from the Royal Exchange

The present English law is, that whoever takes a bank-note or other negotiable security *bona fide* — that is, giving value for it, and having no notice at the time that the party from whom he takes it has no title — is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself.(*t*) It follows from this doctrine, that, in pleading, *mala fides* must be distinctly alleged, and an allegation that a party was not the *bona fide* holder is not equivalent to such an averment.(*u*) The proper way of implicating him in the alleged fraud by pleading, is to aver that he had notice of it, leaving the proof of notice to be estabished in evidence.

The American law on the transfer of lost or stolen notes seems to have taken a similar course to the English. It has been laid down in a multitude of cases in this country, and, indeed, has never been disputed, that negotiable paper may be transferred fraudulently by a finder, thief, bailee, or tortious agent, so as to bind the original owner against the holder, if the latter took it

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to Westminster Hall, that they could no longer carry on their trade with comfort or safety."

(*t*) Raphael *v.* Bank of England, 17 C. B. 161, 33 Eng. L. & Eq. 276. This case, decided in 1855, is a very strong one. Victor St. Paul, a money-changer at Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, took one of the stolen notes (for £500) at Paris, — giving cash for it less the current rate of exchange, — from a stranger, whom he merely required to produce his passport and write his name on the back of the note. It was held, that the circumstance of his forgetting or omitting to look for the notice was no evidence of *mala fides*. The judge left it to the jury to say, 1st, whether St. Paul & Co. paid the value for the note; 2d, whether the notice of the loss was served upon them; 3d, whether, at the time of taking the note, they had the means of knowing that it had been stolen; 4th, whether they took it *bona fide*. The jury answered all these questions affirmatively, and *Jervis*, C. J. ordered a verdict for the plaintiffs for £534. On the motion for a new trial, it was urged that, giving value and being ignorant of the loss did not alone constitute *bona fides*, under the circumstances, and that the banker should have looked over his file of notices. But it was held that his want of recollection of the notice was no evidence of *mala fides*; that the suspicious circumstances would not outweigh the giving value, and actual ignorance of the loss, and that proof of giving value is evidence of *bona fides*. Lord *Tenterden's* doctrine was pronounced to be "long since exploded."

(*u*) Uther *v.* Rich, 10 A. & E. 784; Masters *v.* Ibberson, 8 C. B. 100. In this last case, the defendant being sued on his note, made payable to the order of A, and indorsed by A to B, pleaded that the note was obtained from him by the fraud of D and others; that there was no consideration for A's indorsement, and that the plaintiff had notice of the fraud. The plea was held bad, on special demurrer, because it did not allege that the payee was a party to the fraud, or that he had given no consideration for the note.

honestly and for value.(*v*) But it is strictly held that the assignee must have taken it in the usual course of business, without knowledge of the loss, theft, or fraud, and for a full and valuable consideration.(*w*)

Before the announcement of Lord Tenterden's doctrine requiring caution in the purchaser of bills and notes, two American cases had taken nearly the same ground, though the opinions upon that point were somewhat *obiter*. Other decisions followed in which that doctrine was expressly adopted. And though some of them might have been decided on other grounds, and especially upon the fact that suspicious circumstances appeared on the face of the note, which were really constructive notice of fraud, still it is unquestionable, although the contrary has sometimes been stated, that Lord Tenterden's doctrine was accepted here as law.(*x*) The rule was frequently applied, that wherever

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(*v*) Adkins *v.* Blake, 2 J. J. Marsh. 40; Robinson *v.* Bank of Darien, 18 Ga. 65; Wheeler *v.* Guild, 20 Pick. 545; Weathered *v.* Smith, 9 Texas 622; Wyer *v.* Dorchester & Milton Bank, 11 Cush. 51. In all these cases of lost or stolen notes, Miller *v.* Race, 1 Burr. 452, was adopted as unquestionable law. For other cases, turning upon fraudulent transfer, and establishing the same doctrine, see chapter on Transfer.

(*w*) Bay *v.* Coddington, 5 Johns. Ch. 54; Hall *v.* Wilson, 16 Barb. 548; Goldsmid *v.* Lewis Co. Bank, 12 id. 407; Greneaux *v.* Wheeler, 6 Texas, 515; Wheeler *v.* Guild, 20 Pick. 545. In Dupeux *v.* Troxler, 8 La. 92, the holders sued the note, but intervenors claimed it, alleging it to be the property of their ancestor from whom it was stolen, coming unfairly and without value to plaintiffs. Held, that whenever testimony shows that a note was not obtained in a fair course of trade, the holder is not considered *bona fide*, and cannot recover as against the true owner.

(*x*) Ayer *v.* Hutchins, 4 Mass. 370; Wiggin *v.* Bush, 12 Johns. 306; Brown *v.* Taber, 5 Wend. 566; Adkins *v.* Blake, 2 J. J. Marsh. 40; Hall *v.* Hale, 8 Conn. 336; Cone *v.* Baldwin, 12 Pick. 545; Hunt *v.* Sandford, 6 Yerg. 387; Beltzhoover *v.* Blackstock, 3 Watts, 20; Nicholson *v* Patton, 13 La. 213; Lapice *v.* Clifton, 17 id. 152; McConnell *v.* Hodson, 2 Gilman, 640; Russell *v.* Hadduck, 3 id. 233; Vairin *v.* Hobson, 8 La. 50; Lanfear *v.* Blossman, 1 La. Ann. 148; Louisiana State Bank *v.* Orleans Navigation Co., 3 id. 294; Marsh *v.* Small, id. 402; Holbrook *v.* Mix, 1 E. D. Smith, 154; Sandford *v.* Norton, 14 Vt. 228, 17 id. 285; Pringle *v.* Phillips, 5 Sandf. 157; Dickson *v.* Primrose, 2 Miles, 366. Ayer *v.* Hutchins, the earliest American case on the point, was decided in 1808, sixteen years before the decision in Gill *v.* Cubitt, *Parsons*, C. J. said: "If the indorsee receives the note under circumstances which might reasonably create suspicions that it was not good, he ought, before he takes it, to inquire into the validity of the note; and if he does not, he must take it subject to any legal defence, which might be made against a recovery, by the promisee." Perhaps, however, this language was broader than the decision of the case required. Similar ground was taken in Wiggin *v.* Bush, in 1815. In Brown *v.* Taber, the defendant indorsed an accommodation note at sixty days, to enable the maker to discount it at a bank. The latter, on the bank's refusal, passed it off, when it had but eighteen days to run.

a party taken a note or bill without due caution, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker, acceptor, or prior indorser, is let into his defence, of fraud, loss, or theft. This ground was

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in the purchase of lottery-tickets at retail price, the vendor knowing that he was not a dealer in tickets, and having been informed that the note had been in the bank, and the bank-marks being upon it; it was held that the circumstances combined were sufficient to put the plaintiff on inquiry, though no one was decisive, and that thus he was chargeable with notice of the misapplication of the note, and that the indorser was not liable. Adkins *v.* Blake, 2 J. J. Marsh. 40, was decided in 1829, a few years after Gill *v.* Cubitt, and a doctrine very similar to that of the latter case was announced, although, since no reference was made to Gill *v.* Cubitt, which, indeed, had not up to that time, we believe, been cited upon the question of negligence in any American reports, perhaps it may be inferred that it was not in the mind of the Kentucky Court in rendering judgment. B lost bank-notes, which came into the possession of H, "by finding or otherwise, and he exchanged them with Adkins for a negro, the latter (i. e. Adkins) *not knowing that they belonged to B.*" The court held, that "a purchaser from the finder or the thief may be subjected to the payment of the value of the note to the owner, if he knew, or had sufficient reason, to suspect, that it had been lost or stolen. While the interests of trade require that the negotiability of mercantile paper shall not be affected by occult circumstances, not apparent or ascertainable in the ordinary circulation of it, moral honesty demands that all who trade in such commodity shall act with probity and a reasonable vigilance. As no honest and just man would buy a bank-note, when he knew, or had strong grounds for suspecting, that it had been lost or stolen." The court say that this rule of suspicion is deduced from Lord Mansfield's doctrine in Grant *v.* Vaughan, Miller *v.* Race, &c., which they cite. This circumstance confirms the opinion we ventured to express above, viz. that the recent doctrine making gross negligence only *evidence* of fraud, was not contemplated by the earlier leading cases in Lord Mansfield's time. It has frequently been stated that Lord Tenterden's doctrine was a gross departure from Miller *v.* Race, and that Lord Denman's substitute was a direct return to the latter. In Hall *v.* Hale, *Hosmer*, C. J. adopted the rule of Gill *v.* Cubitt, saying, "It is equally well settled that if an indorsee takes a bill without due caution, and under circumstances which ought to have excited the suspicion of a prudent and careful man, the maker, acceptor, or prior indorser may be let into his defence. . . . . The ordinary and prudent circumspection which is exercised by men who transact their concerns with care and caution is demandable of the plaintiff." The plaintiff's actual good faith was not questioned. In Hunt *v.* Sandford, *Green*, J said: "In any case in which the indorsee takes the paper under circumstances which might reasonably create suspicion that it was not good, he takes it at his peril. This rule is usually applied to the case of notes overdue, but the principle is of general application." Gill *v.* Cubitt was affirmed. In Cone *v.* Baldwin, the court said, a little *obiter:* "If the circumstances attending the transfer were such as to put the plaintiffs upon their guard, they were bound to make inquiry; and if they did not, they purchased at their peril." In Beltzhoover *v.* Blackstock, *Sergeant*, J. said: "I concur in the position, that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defence. Gill *v.* Cubitt, 3 B. & C. 466." Nicholson *v.* Patton was a case in which a note had been lost by a notary public. *Rost*, J. said: "We take the rule as settled in England, in the case of Gill *v.* Cubitt, for our guide," and that when a broker

taken in strong terms, by some courts, as late as 1851.(*y*) But in 1836 the then recent doctrine of Lord Denman was substituted for the previous one by the Supreme Court of Connecti-

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takes a note under suspicious circumstances, for the sake of profit, or because the names on it are good, he takes it at his peril, and hence it behooves him to make inquiries for his transferrer's title. In Russell *v.* Hadduck, in 1846, it is said: "The rule undoubtedly is, that where a party is about to receive a bill or note, if there are any such suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he shall be bound to make such inquiry, or if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. In other words, he shall act in good faith, and not wilfully remain ignorant, when it was his duty to inquire into the circumstances, and know the facts." In Vairin *v.* Hobson, a check for $650, having been lost by accident, was sold at St. Louis, 1,500 miles from its place of payment, New Orleans, by a passenger in a steamboat to a merchant from New Orleans, twenty-five days after date, for its full value in goods and money, and the latter sold it at five per cent discount to the plaintiffs, who sued the drawers. It was held that payment of value is not alone sufficient evidence of good faith and fair dealing in the purchaser of a lost or stolen instrument. Gill *v.* Cubitt and Down *v.* Halling, were completely adopted, and the court added: "The principles recognized in these decisions we believe to be reasonable and just." The decision was expressly put upon these grounds, independently of the check being overdue. In Marsh *v.* Small, in 1848, a suit was brought on a lost check, drawn by the defendants. It was pleaded, that the plaintiffs received the check incautiously. But the court, without objecting to the plea, thought it not proved, and said: "The circumstances under which it was offered were not such as to excite suspicion, nor put the plaintiffs on inquiry whether the person presenting it was the *bona fide* holder. . . . . The offer of such a check would not of itself necessarily excite the inquiry of the most prudent and cautious. . . . . No negligence has been disclosed from which bad faith can be inferred, and in such cases the holder is to be protected, although the note or check may have been lost or stolen." In Sandford *v.* Norton (1842), *Redfield*, J. said: "When it is shown that the note was without consideration, or void in its inception by being obtained by force or fraud, or that it had been lost, this does so far impeach the title of the holder as to impose upon him the obligation of showing that he paid value, and, in many cases, that he was guilty of no want of ordinary care in taking it. Gill *v.* Cubitt, which has reference to lost notes, turns upon the point of being taken without due caution. Some of the later cases, in regard to this particular point, seem to have receded a little from this case. But the doctrine of the case of Gill *v.* Cubitt is in the main adhered to. And we do not well see how any other rule could consist with a tolerable regard to justice."

(*y*) Pringle *v.* Phillips, 5 Sandf. 157, decided in 1851, is a strong case. *Duer*, J., quoting Crook *v.* Jadis, Backhouse *v.* Harrison, and Goodman *v.* Harvey, says: "But with all possible respect for the learned tribunal by which these cases were decided, we cannot regard them as evidence of the law that we are bound to follow. . . . . It may well excite our surprise that the judges of the King's Bench have felt themselves at liberty to repudiate a doctrine to which their predecessors, in all the courts, in the fullest conviction of its justice and expediency, had so long and so inflexibly adhered. Either the maxim that it is the duty of judges '*stare decisis*' must be exploded as ground-

cut, and now we believe that it may be considered as generally, if not universally, adopted in this country.(z)

We have presented the law on this subject in connection with various topics and at much length, because we regard it as of great importance. Very few of the questions which have grown out of negotiable paper have given rise to so much conflict, fluctuation, and uncertainty. And few or none of them demand so imperatively, that they should be answered by a rule generally adopted, uniformly applied, and well understood.

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less, or cases which involve its flagrant violation must be disregarded." In Holbrook *v.* Mix, 1 E. D. Smith, 154, decided the same year, it was held, that the plaintiffs, upon taking a certain note, fraudulently obtained, had sufficient notice to put them upon inquiry; that not having made any inquiry, they acted at their peril.

(z) Brush *v.* Scribner, 11 Conn. 388; Matthews *v.* Poythress, 4 Ga. 287; Hall *v.* Wilson, 16 Barb. 548; Worcester Co. Bank *v.* Dorchester & Milton Bank, 10 Cush. 488; Goodman *v.* Simonds, 20 How. 343; Magee *v.* Badger, 30 Barb. 246. Matthews *v.* Poythress (1848) was one of the first American cases that adopted Lord Denman's last doctrine. The plaintiff, in trover for his stolen note, proved that the defendant, in taking the note, became suspicious, thought the note was not genuine, or that the maker was not solvent, and disliked the appearance and manner of the two strangers from whom he had the note; and that he inquired of the genuineness of the note, and the solvency of the makers, and, becoming satisfied upon these two points, took the notes. The judge below held, that the defendant had inquired sufficiently, that general suspicion was not enough to put the purchaser upon inquiry as to the title, and a failure to do so was not such *mala fides* as to enable the loser to recover. The court above, after a very elaborate opinion, concluded thus: "It is the judgment, therefore, of this court, that the title of the purchaser of a negotiable bill, note, or other security transferable by delivery, who takes it before due, from one who himself has no title *bona fide*, and for value, is a good title. And that such title is not defeated by the want of such caution in the purchase as a careful and prudent man will take of his own affairs, or by gross negligence." In Brush *v.* Scribner, as early as 1836, *Williams*, C. J. decidedly objected to Lord Tenterden's notions of a *bona fide* transfer. Goodman *v.* Simonds (1858) is a leading case on this topic. An accepted and indorsed bill of exchange was placed by the drawer, as collateral security for his own debt, in the hands of his creditor; and when the creditor came to sue the acceptor, the court instructed the jury, "that if such facts and circumstances were known to the plaintiff as would have caused one of ordinary prudence to suspect that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury would find for the defendant." This instruction was held to be erroneous. The whole question was very thoroughly considered, and it was said that "Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover, — and clearly it would not unless attended by bad faith, — it cannot require any further reasoning to demonstrate that the instruction was erroneous." In Worcester Co. Bank *v.* Dorchester & Milton Bank, *Metcalf*, J. affirmed Lord Denman's doctrine, and said that even gross negligence in the holder is not tantamount to fraud, although it may be given in evidence to a jury as tending to prove fraud. In Magee *v.* Badger, the most recent case on the subject,

And we say, in conclusion, that the rule applicable to these questions should rest upon these three principles, all of which were devised, and are well adapted, to insure the unrestricted circulation of mercantile securities : —

1. That, though at common law no man can acquire a title to any personal chattel from one who has no title to it himself, except by purchase in market overt,(*a*) a complete exception to this rule is made in favor of negotiable paper.

2. The *bona fide* holder of a lost, stolen, or tortiously transferred note or bill, transferable by mere delivery, and not overdue or otherwise apparently dishonored, who has taken it without knowledge, or actual, or constructive notice of the loss or fraud, in the usual course of business, and for a full and valuable consideration, has a perfect title to that note or bill against the world, and becomes by the taking it, its true owner.

3. The title of such a holder is not defeated by proof that he was negligent, or even grossly negligent in taking the note or bill, and that he omitted to make inquiries which common prudence would have dictated. But while gross negligence is not itself *mala fides*, it may be evidence thereof for a jury.

It may be added, that in Scotland Lord Tenterden's doctrine was never adopted as law.(*b*)

Where the defect in title appears on the face of the lost or stolen instrument, at the time of transfer, as where it is transferred after it is due,(*c*) or after dishonor, the party obviously has constructive notice of his assignor's infirmity, and can have no better title than he. It is an obvious case of transfer with notice, and follows the ordinary rule of paper overdue or otherwise defective.(*d*)

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decided December, 1859, the judge below had charged, that if the plaintiff took the note with notice of certain suspicious facts, it would be void in his hands ; and that even if he had knowledge of such facts as should have prompted further inquiry, that might have led to a knowledge of the facts, the note would for that cause be void. It was held that "this latter branch of the charge went beyond the settled rule of law in regard to the validity of negotiable paper in the hands of a holder for a valuable consideration." Keutgen *v.* Parks, 2 Sandf. 60, bears upon this question.

(*a*) Peer *v.* Humphrey, 2 A. & E. 495.

(*b*) Thomson, Bills, 314, 316.

(*c*) Down *v.* Halling, 4 B. & C. 330 ; Weathered *v.* Smith, 9 Texas, 622.

(*d*) Ayer *v.* Hutchins, 4 Mass. 370 ; Wiggin *v.* Bush, 12 Johns. 306 ; Fowler *v.* Brantly, 14 Pet. 318 ; Goodman *v.* Simonds, 20 How. 343. "A person who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges

And where the consideration for which a stolen note is given is illegal by statute, the transferee for such consideration cannot hold it, and will not be regarded as a holder for value; because it is a value which the law cannot recognize. The two principal illustrations of this last rule are notes tainted with usury, and notes given for money lost at play.(*e*)

With respect to the burden of proof in actions by *bona fide* holders, it may be remarked, in brief, that the holder of negotiable paper, payable to bearer, as bills of exchange and promissory notes, may ordinarily recover their amount from the promisors, without proving how he came into possession of them; for *prima facie*, possession of mercantile paper is honest possession. But when the defendant in such a suit has proved that the instrument was originally without consideration, was obtained by illegal means, as by fraud, felony, or force, or has since been the subject of fraud, or felony, or loss, then the holder must take up the burden of showing that he gave value for the instrument. This proof of value being established, if the promisor would defend, he must now show that the transfer to the plaintiff was fraudulent.(*f*)

These principles are applied, also, in the cases upon lost and stolen notes.(*g*) But with respect to the burden of proof, a broad distinction has been drawn, in some cases, between bank-bills, lost or stolen, and other negotiable paper. For the holder

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of a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment." Andrews *v.* Pond, 13 Pet. 65.

(*e*) Peacock *v.* Rhodes, Doug. 633; Clarke *v.* Shee, 1 Cowp. 197; Mason *v.* Waite, 17 Mass. 560. Lord *Mansfield*, in Peacock *v.* Rhodes, stating the rule that a *bona fide* holder for value of a note is discharged from preceding equities, adds: "Unless, perhaps, in the single case (which is a hard one, but has been determined) of a note for money won at play."

(*f*) But it is held in Louisiana that a simple denial of the plaintiff's right to sue as the holder of a negotiable instrument, cannot authorize the maker to contest his title to it, when he holds by a blank indorsement, unless it has been lost or stolen. McKinney *v.* Beeson, 14 La. 254.

(*g*) Solomons *v.* Bank of England, 13 East, 135, note; Miller *v.* Race, 1 Burr. 452; Grant *v.* Vaughan, 3 id. 1516, Peacock *v.* Rhodes, Doug. 633; Paterson *v.* Hardacre, 4 Taunt. 114; De La Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385; Raphael *v.* Bank of England, 17 C. B. 161; Nicholson *v.* Patton, 13 La. 213; Worcester Co. Bank *v.* Dorchester & Milton Bank, 10 Cush. 488; Wyer *v.* Dorchester & Milton Bank, 11 id. 51

of an ordinary note of hand, on proof that it has been lost, stolen, or fraudulently dealt with, must show how it came into his possession. But it is said that no such burden is thrown upon the holder of a stolen bank-bill.(*h*)

The ground of this distinction is the unquestionable fact that bank-bills are not ordinary bills of exchange, and should not be hampered by those restrictions which are necessary for the latter.

(*h*) Worcester Co. Bank *v.* Dorchester & Milton Bank, 10 Cush. 488; Wyer *v.* Dorchester & Milton Bank, 11 id. 51. In the first case, *Metcalf*, J. said: "It is well settled in this Commonwealth, that, in a suit by the holder of a promissory note or bill of exchange, which has been stolen, or which has otherwise been fraudulently put into circulation, the burden is on the plaintiff to prove that he came fairly into possession of it, under such circumstances as entitle him to recover. And it was contended by the counsel for the present defendants, in his learned and able argument, that the same rule of evidence is to be applied to the case of a stolen bank-bill. We doubt this, but need not decide the point now." In the second case, cited *supra*, the same judge said: "We are now to decide whether the rule of evidence, which is applied to promissory notes and bills of exchange that are stolen, or otherwise fraudulently put into circulation, is applicable to bank-bills that are circulated after they have been stolen. In the case of such bills of exchange and promissory notes, the burden is on the holder to prove that he took them in good faith. According to the recent decisions, that burden is very light. See 10 Cush. 491. But we are of opinion that the rule of evidence is different in the case of a bank-bill." Accordingly, the plaintiffs were held entitled to recover, without showing how they came by the bills, as the bank showed no reasonable ground for doubting their honesty. The same doctrine had been held in Louisiana Bank *v.* Bank of United States, 9 Mart. La. 398, as early as 1821. *Mathews*, J. said that though it might be the duty of the holder of a stolen note, other than a bank-note payable to bearer, to prove his title by good faith and value, "an exception is adopted in law in case of bank-notes. The facility with which they pass from hand to hand, the circumstance of their not being esteemed, like bills of exchange, as mere securities of debt, but treated as money in the ordinary course and transaction of business, by the general consent of mankind, shows that they may with propriety be placed on a footing different in some respects from that of ordinary bills and notes. Possession is *prima facie* evidence of property in them, and the holder is entitled to all the benefits resulting from a rightful ownership, until the contrary be made apparent." So as early as 1749, in Scotland, the holder of a bank-bill lost, stolen, or fraudulently acquired, was not compelled to prove value. In Crawfurd *v.* Royal Bank, the plaintiff lost a bank-note, which came to the Bank by discount. On being sued for the amount, the bank pleaded that they were *bona fide* purchasers, and therefore not subject to a *rei vindicatio*, because such a claim would be an impediment to commerce. The plaintiff answered, that bank-notes have no privilege by the law of Scotland above bills of exchange, except freedom from the necessity of indorsation, and that possession of a bank-note, like that of money, though it presumed property, yet suffered all presumptions to be rebutted by positive proof. But the court were unanimous on two points. "1st. That money is not subject to any *vitium reale;* and that it cannot be vindicated from the *bona fide* possessor, however clear the proof of the theft may be. 2d. That bank-notes, serving the purposes of money, must be entitled to the same privileges; and therefore that Mr. Crawfurd had no claim to the note in question." Crawfurd *v.* Royal Bank, Ross's Lead. Cas. on Bills, 229.

We have already seen that, at an early date, bank-notes were pronounced by Lord Mansfield to be "treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes." (*i*)

The reason referred to by Lord Holt, as stated on a previous page, why money forms an exception to the common rules of transfer and title, namely, that "it has no ear-mark," also comes in; for it is said, in the two cases referred to, that while ordinary bills and notes can always be identified, and can generally be traced through their whole course of circulation,—their negotiation being as much a matter of entry in the books of traders and of banks as any other of their transactions,—bank-bills cannot, in most cases, be identified. For, since they pass as money, their number and denomination, the name of the bank that issued them, would not be noted on account-books, except in a special case, and for some special reason. Accordingly, while it is no hardship to call on the holders to show how they acquired ordinary bills and notes, when dishonesty has been practised upon the promisor, such a requisition would be a grievous burden upon the holder of a common bank-bill. (*j*)

(*i*) Miller *v.* Race, 1 Burr. 452.

(*j*) Worcester Co. Bank *v.* Dorchester & Milton Bank, 10 Cush. 488; Wyer *v.* Dorchester & Milton Bank, 11 id. 51. We think, however, that not all the earlier cases recognized the distinction between bank-bills and other bills, in respect of the *onus probandi*. For although all hold that possession of bank-bills raised the presumption of ownership, some regarded it as the duty, at least, of such holders to account for their possession, on proof of a previous fraud or felony with regard to them. Thus, in Solomons *v.* Bank of England, 13 East, 135, note, a bank-note was fraudulently obtained, and the party presenting it for payment, subsequently, was desired to inform the bank how he came by it; but the only account he would give of it was, that he received it in payment from a man dressed in such a way, of whom he knew nothing, though bank-notes of so large a value (£500) were not usually circulated in that foreign country. This was held to be sufficient evidence to be left to a jury of the holder's privity to the original fraud. Lord *Kenyon* said, that when the plaintiffs were informed of the circumstances, they refused to give any satisfactory account of it. "Under such circumstances, it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud, and that was all that I told the jury." *Ashhurst*, J. said: "On this evidence of suspicion, the plaintiff ought to have given every possible account how his correspondents came by it, in order to clear them from the imputation of fraud; and this was not done; the suspicion, therefore, remains as it did before." We must suppose, therefore, to make this case support the modern rule, that the holder need not have given any definite explanation of his possession; but

The present English form of pleading in actions by the holder of bills which are affected with loss, theft, or fraud, against the promisor, appears to be as follows. The defendant pleads to the suit, that the bill was obtained by fraud, &c., and also that it was indorsed to the plaintiff without consideration. But though the allegation would be bad if this latter branch was left out, the defendant needs only to prove the former. For the proof of loss, theft, or fraud, throws the *onus* of proving consideration upon the plaintiff, who replies, if this be pleaded, *de injuria*. And this is true whether the bill be founded in felony or fraud, or has since been the subject of loss or fraud.(*k*)

In most American courts, the simple plea of fraud, &c. would not be held bad. In Scotland, a holder is presumed to have acquired the note or bill onerously (or for value), and *bona fide;* and this presumption cannot in general be redargued, except by his writ or oath. And even in case the bill or note be charged with fraud, parol proof is not always allowed; and the modern rule in bank-bills, namely, that proof of fraud, loss, or theft in general, is not sufficient to compel the holder to account for his possession, is said, though it seems doubtful, to have been extended in Scotland to all negotiable paper.(*l*)

The ground of these indulgences to the *bona fide* holder for value of mercantile securities, is the fundamental policy of giving the widest credit and currency to negotiable paper. Accordingly, when a thief or finder pays bank-bills to an innocent party

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having given one, it was left to the jury. Lord *Ellenborough*, in King *v.* Milsom, 2 Camp. 5, said that holders of negotiable instruments in general should not, without strong evidence of fraud, be compelled by any prior holder to disclose the manner in which they received them. But that suit was on a bank-note, and so far at least sustains the modern law. In the later case of De La Chaumette *v.* Bank of England, 9 B & C. 208, it was held that, where it was proved by the defendants that a bank-note had been stolen, it was incumbent on the plaintiff to show that he had given full value for it. The same doctrine was held in the same year (1829) with regard to a bank post-note, which had been stolen, and for his possession of which, accordingly, the holder was compelled to account. Fulton Bank *v.* Phœnix Bank, 1 Hall, 562.

(*k*) Harvey *v.* Towers, 6 Exch. 656; Bailey *v.* Bidwell, 13 M. & W. 73; Smith *v.* Braine, 16 Q. B. 244; Bingham *v.* Stanley, 2 Q. B. 117; Mather *v.* Maidstone, 1 C. B., N. S. 273.

(*l*) Thomson, Bills, 94, 95, 317, 255. "In Scotland, it is not necessary for the holder of a bill which has been lost, stolen, or fraudulently acquired, to prove that he gave value for it, and the want of value can only be proved by his writ or oath." Crawfurd *v.* Royal Bank, Ross's Lead. Cas. on Bills, 229, head note. But this was a case of a lost bank-bill.

for value, that is, for a new value or consideration of any kind, the receiver holds them precisely as he would money. Indeed, we should look upon bank-bills as the exact equivalent of money, both as to the rule, and as to all exceptions to the rule. Thus, if the bills were given only to *secure* a pre-existing debt, we should say the owner could generally reclaim them, and so he could if we suppose money, that is, coin, so given, and with an ear-mark, so as to be capable of identification by the true owner. If they were given in *payment* of a pre-existing debt, it would be more doubtful. But we should be disposed to state as the rule of law, that if the bills were given to secure a preceding debt, and perhaps if given in payment of it, the original owner could reclaim them, provided the party receiving them and giving them up would be placed in as favorable circumstances as if the debt had not been so secured or paid, and not otherwise.

We have been considering the case of notes and bills transferable by mere delivery. But when mercantile paper is negotiable by indorsement only, the rights of the *bona fide* purchaser are more restricted. No title passes with a forged indorsement. Consequently, possession of a note bearing such an indorsement conveys no more interest to the transferee, even though he give value, and is ignorant of the fraud, than the forger had, which is none at all. From this it results, first, that the loser of a note with a forged indorsement, may recover it from any hands; and, secondly, that a maker, acceptor, or other promisor who has already paid such a bill, is liable again for the amount to its proper owner.(*m*)

This latter liability is sometimes enforced, though there be considerable delay by the loser in notifying the promisor of the accident,(*n*) though, as we have said before, the loser ought most obviously to give immediate notice to all parties liable, that they may not suffer detriment, and that the forger, in case of forgery, may be the more easily apprehended.(*o*)

(*m*) Canal Bank *v.* Bank of Albany, 1 Hill, 287; Goddard *v.* Merchants Bank, 2 Sandf. 247.

(*n*) Johnson *v.* Windle, 3 Bing. N. C. 225. In this case, the delay was six weeks, and in the mean time the defendant had paid the bill to an indorsee under a forgery. Plaintiff recovered. But see the cases upon the effect of delay in giving such notice, commented on, and some of them disapproved, (especially Cocks *v.* Masterman, 9 B. & C. 902,) in Canal Bank *v.* Bank of Albany, 1 Hill, 287.

(*o*) *Ante*, p. 255.

Bankers must always pay their acceptance on a forged draft, because they are bound to know the handwriting of their customers, and hence must bear the loss, when the signature of the drawer is forged and they have accepted.(*p*) When both parties are innocent, and the loss must fall upon one, it should be upon the one who, in law, most essentially facilitated the fraud.(*q*)

Paying to a forged order is held to raise a sort of presumption of negligence on the part of the banker. Under this rule concerning the party aiding the fraud, it is held that the drawer's negligence, by assisting the forgery, may shift to himself the acceptor's liability.(*r*) And other circumstances may have the same effect.

But as an offset to the acceptor's double liability, in case of paying a forged draft, he may always show that the note or bill was tortiously indorsed, and may demand proof of its genuineness before paying the bill. And if a bank pay a bill to a *bona fide* holder under a forged indorsement, it can recover the amount paid from the holder, for it is not required to know the signature.(*s*)

By the late English statute, 16 and 17 Vict. c. 59, § 19, a banker is relieved from much of the responsibility of ascertaining the genuineness of an indorsement, in bills and notes payable to order on demand.

The *loser* of a note or bill may have his action for its amount against the parties to the paper. It is the general rule that when a drawee, maker, or other party liable on a bill or note, is sued thereon, he may insist on the production of the instrument; (*t*) and its absence, unaccounted for, will furnish an

(*p*) Leach *v.* Buchanan, 4 Esp. 226; Forster *v.* Clements, 2 Camp. 17; Price *v.* Neal, 3 Burr. 1354; Wilkinson *v.* Johnson, 3 B. & C. 428; Esdaile *v.* La Nauze, 1 Younge & C. Exch. 394; Hall *v.* Fuller, 5 B. & C. 750; U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333, *ante*.

(*q*) Smith *v.* Sheppard, a manuscript case cited in Chitty, Bills, 9th ed. 261.

(*r*) Young *v.* Grote, 4 Bing. 253; Morrison *v.* Buchanan, 6 Car. & P. 18.

(*s*) *Ante*, chapter on Transfer by Indorsement.

(*t*) An acceptor who has paid the amount of his bill to the holder, on the refusal of the latter to give it up, will be allowed to recover his money, though it be alleged that the note has been lost. Alexander *v.* Strong, 9 M. & W. 733. "The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and, thirdly, that he may obtain immediate possession of the bill upon paying the amount.

adequate defence to the suit.(*u*) For the defendant is entitled to the note on payment thereof, as his voucher of discharge, as he only covenanted to pay the value of the note on its presentment.(*v*) If an action be brought for the price of promissory notes which were sold to the defendant, and afterwards lost, their production is not required of either party, but the existence and sale of them may be proved by parol evidence.(*w*) The general rule that an action on a note cannot be sustained without profert of the note, prevents owners of negotiable paper, where the par-

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.... And the acceptor, as well as the drawee, has a right to the possession of the bill upon paying it, to be used as a voucher in the settlement of accounts with the drawer." Musson *v.* Lake, 4 How. 262. See also Freeman *v.* Boynton, 7 Mass. 483; Woodbridge *v.* Brigham, 13 id. 556

(*u*) Poole *v.* Smith, Holt, N. P. 144; Crowe *v.* Clay, 9 Exch. 604; Hansard *v.* Robinson, 7 B. & C. 90, 9 Dow. & R. 860; Shearm *v.* Burnard, 10 A. & E. 593; Atkins *v.* Owen, 2 id. 35; Davis *v.* Dodd, 4 Taunt. 602; Burns *v.* Tallon, Armst. M. & Ogle, 299; Fryer *v.* Brown, Ryan & M. 145; Angel *v.* Felton, 8 Johns. 149; Morgan *v.* Reintzel, 7 Cranch, 273; John *v.* John, Wright, 584; Sebree *v.* Dorr, 9 Wheat. 558; Bowman *v.* Smith, 1 Strob. 246; Brandt *v.* Foster, 5 Iowa, 287. Poole *v.* Smith was an action by the indorsee of a bill, indorsed in blank, against the acceptor. The bill had been drawn six years, was lost after action brought and notice of trial to the defendant, and the Statute of Limitation could be pleaded to any future action upon it. Yet the rigorous rule requiring production of the bill was maintained, and the plaintiff nonsuited. But this was an undefended cause, and a similar one would probably be decided otherwise in this country. In Brandt *v.* Foster, it was held, that, in an action on a promissory note, no final judgment can be rendered for the plaintiff, if the note is not produced in court, nor its absence accounted for. So, upon the general proposition that, when the contents of an instrument are sought after, it must be produced, or its absence excused, see Phillips on Evid., Cowen & Hill's note 860 to p. 452. In Sebree *v.* Dorr, 9 Wheat. 558, secondary evidence was not admitted upon a promissory note, when the original was within the control or custody of the party. But the English practice does not require production of the bill when the plea in defence is on a different issue. Lane *v.* Mullins, 2 Q. B. 254; Chaplin *v.* Levy, 9 Exch. 531; Davis *v.* Barker, 4 Dowl. & L. 468. See further, Vain *v.* Whittington, Car. & M. 484; Hunt *v.* Alewyn, 3 Car. & P. 284. But production may be necessary to the recovery of interest. Hutton *v.* Ward, 15 Q. B. 26. See *infra*, p. 310, note *v.*

(*v*) Hansard *v.* Robinson, 7 B. & C. 90; Wilder *v.* Seelye, 8 Barb. 408. In Burridge *v.* Geauga Bank, Wright, 688, the rule adopted was, that a party cannot recover the amount of negotiable paper without producing or identifying it, so that the maker may know if he has already paid it, or protect himself against future payments.

(*w*) The production of the note "could only be held necessary by not attending to the distinction between proving the *existence* and the *contents* of a note, and the *sale* of a note. Of the former, the note is the better evidence; but of the latter, the note furnishes no evidence." Lamb *v.* Moberly, 3 T. B. Mon. 179. And wherever the notes or bills are collateral to the suit, a witness may testify to their existence, although they are not produced, nor their absence accounted for. Snodgrass *v.* Branch Bank at Decatur, 25 Ala. 161.

ties liable are in doubt concerning the execution, or amount, or some other particulars of the bills, from having any inducement to destroy them, in hope of recovering more advantageously under secondary evidence of their contents.(*x*)

An acknowledgment of the debt, or even a promise of payment, will not dispense with profert of the note, nor release the plaintiff from the necessity of accounting for its absence; (*y*) because the payor may not only ask to see the note in possession of the party claiming payment, as evidence of his ownership, but may also demand possession of the note on his payment, as his best security against further demand.(*z*) Indeed, an express promise to pay the contents of a lost note, if given without new consideration, is void.(*a*)

Originally, at common law, no action could be maintained on a lost specialty, because a profert thereof was strictly necessary; whereas, in actions on simple contracts it was not so.(*b*) Courts of equity, however, admitted actions without profert on specialties, and for a long time courts of law have also sustained them, upon sufficient explanation of the want of profert.(*c*)

Accordingly, if an instrument in suit can be shown to have been lost, stolen, or destroyed, or if any other proper reason can be suggested for its absence, a remedy thereon exists.(*d*) But

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(*x*) "To permit a party intentionally to destroy his bond or note, or other security, and then come into court in any form of action and recover the debt or demand, of which the destroyed instrument was the best and proper evidence, would open a door to frauds without number. There may be memorandums, indorsements, attesting witnesses, or matters apparent on the face of the instrument, very important to the rights of the other party; and to get rid of which may be the motive for carelessness or destruction." *Hornblower*, C. J. in Vanauken *v.* Hornbeck, 2 Green, N. J. 178.

(*y*) Powell *v.* Roach, 6 Esp. 76; Vanauken *v.* Hornbeck, 2 Green, N. J. 178. See Hansard *v.* Robinson, 7 B. & C. 90.

(*z*) Chambers *v.* Hunt, 2 N. J. 552.

(*a*) Davis *v.* Dodd, 4 Taunt. 602, Wils. Exch. 110; Vanauken *v.* Hornbeck, 2 Green, N. J. 178. An averment that the defendant was indebted on a bill of exchange, and that the plaintiff, having lost the bill, had, at his request, given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the defendant to pay the contents of the bill. Williamson *v.* Clements, 1 Taunt. 523.

(*b*) Bank of U. S. *v.* Sill, 5 Conn. 106.

(*c*) Read *v.* Brookman, 3 T. R. 151; Toulmin *v.* Price, 5 Ves. Jr. 235; Ex parte Greenway, 6 id. 812; Walmsley *v.* Child, 1 Ves. Sr. 341, and notes; Whitfield *v.* Fauesset, id. 387, Glynn *v.* Bank of England, 2 id. 38; Hinsdale *v.* Miles, 5 Conn. 331; 1 Fonbl. Eq. 15, note.

(*d*) "If the instrument declared on — whether it be a bill, a bond, or a deed — be

concerning the form of this remedy, whether it shall be at law or in equity, there has been much conflict of authority. And upon this question distinctions are drawn between negotiable and non-negotiable notes, between notes destroyed and notes merely lost or mislaid, and the like, which distinctions we must proceed to consider.

If the action be upon a note negotiable by mere delivery, which is lost or stolen before maturity, the unquestionable rights of any *bona fide* assignee of the finder or thief, will affect the question of remedy. For if the defendants in a suit by the loser should be ordered to pay the note, they would obviously be liable to pay the same note twice, since the note or bill may be found, and may have been purchased in good faith before maturity, and the promisor cannot escape payment on the demand of such a purchaser. This would work a manifest injustice, especially as the only negligence imputable to the parties is that of the payee in losing the note.(*e*)

The just decision of the question, therefore, must be, that the defendant shall pay the money to the plaintiff, to whom it rightfully belongs; and then the plaintiff shall indemnify him by adequate security against any liability to a future applicant.

Then, if a holder of the note should appear, who was entitled to recover it, the loss would fall ultimately upon him who lost the note; and the reasonableness and justice of this are apparent, not only where he lost it by his own fault, but even where he was fully innocent: for the loss must fall somewhere, and as others were at least equally innocent, he whose loss of the note caused the mischief should be the one to suffer from it.

This conclusion is thought to apply with especial force where the defendant is not the maker of the note or acceptor of the bill, but its indorser or drawer.(*f*)

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lost, the loss being duly proved and so the absence of the instrument properly accounted for, secondary evidence may be given of its contents." *Jervis*, C. J. in Charnley *v.* Grundy, 14 C. B. 608, 614. See Selden *v.* Pringle, 17 Barb. 458; Hinsdale *v.* Miles, 5 Conn. 331.

(*e*) The owner of a note is bound, of course, to take care not to lose it. And though his good faith be undoubted, the question will arise at the trial, whose fault is it that the note is not in the plaintiff's possession. See Beawes, Bills, 178; Grant *v.* Vaughan, 3 Burr. 1516, 1526.

(*f*) Wilder *v.* Seelye, 8 Barb. 408, *supra*, p. 286, note *v*; Story on Bills, § 449; Story on Notes, § 448.

But courts of law have been thought to possess, in general, no machinery by which they can ascertain the adequacy of the indemnity, or indeed impose any terms of this kind upon a plaintiff; and courts of equity can do this perfectly well. In England, therefore, courts of law would formerly give no relief whatever in any such action, but would turn the parties over to equity. We have already mentioned an additional reason why courts of law refuse this relief, namely, that the payor of a note is entitled to possession of the note, as his only perfect protection against the payee.(*h*) But we think this reason to be somewhat technical, and not altogether satisfactory; for a full receipt may be kept and is as good a defence as the note itself against the payee; and equity can no more compel delivery of a lost note than law can; and a judgment on the note, at law, satisfied on record, is as effectual a bar to any further claim as a decree in equity.

The difficulty which most courts of law have found in adjusting indemnities is a more substantial ground for the resort to equity, and is often of great force.

However, this reason, like the other, can only apply to notes and bills which are transferable by mere delivery, and are liable to such transfer.

There seems, therefore, to be no reason why a note which is not negotiable, or which, if negotiable, has had its negotiability restrained by an indorsement in full, or a special indorsement, should not be the subject of a suit at law.(*i*)

It is true, that it does not stand in precisely the same position as a deed of lands, or a bond or will, or other written instrument. For if their contents are proved by secondary evidence, no objection to substituting these contents for the instrument itself could arise out of the fact that the instrument by a wrongful transfer may put a transferee to loss and difficulty, from its purporting to admit of such transfer. It is true that a negotiable

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(*h*) *Supra*, p. 286, note *v*.

(*i*) Bills or notes, not originally negotiable in England, as well as in this country, can be sued at common law. Wain *v*. Bailey, 10 A. & E. 616, 2 Per. & D. 507, Leigh's N. P. 571; Clay *v*. Crowe, 8 Exch. 295, 18 Eng. L. & Eq. 514; Price *v*. Price, 16 M. & W. 232, 243; Charnley *v*. Grundy, 14 C. B. 608, 25 Eng. L. & Eq 318; Rolt *v*. Watson, 4 Bing. 273, 12 J. B. Moore, 510; Mossop *v*. Eadon, 16 Ves. Jr. 430.

note, however indorsed, admits of transfer by further indorsements, and this indorsement may be forged. But as the transferee by a forgery could acquire no legal rights,(*j*) the possibility does not seem to be a sufficient reason for denying all right and remedy at law to the owner, when the original is lost.

In all such cases, the note being in express terms payable only to the plaintiff or his order, a defendant runs no risk of future demand. For such demand must be brought in the payee's name, and to that the judgment in the present suit could be pleaded. Accordingly, there being no risk run, no indemnity will be required, and the action at law is maintainable.(*k*)

The legal action on such a note is permitted for a double reason, if the note be destroyed also.(*l*) But proof of loss is sufficient to support the action at law, on non-negotiable notes, without proof of destruction. And in such case the plaintiff may recover on a count for money had and received.(*m*) In some courts in this country, lost notes will not be presumed to be negotiable, and their negotiability must be affirmatively proved; and if their existence, terms, and loss are well established, and they are not proved to be negotiable, nothing more is required to sustain the remedy at law.(*n*)

(*j*) *Ante,* Vol. I. p. 277.

(*k*) Pintard *v.* Tackington, 10 Johns. 104; Chamberlain *v.* Gorham, 20 id. 144; Rowley *v.* Ball, 3 Cowen, 303; McNair *v.* Gilbert, 3 Wend. 344; Hough *v.* Barton, 20 Vt 455; Whitesides *v.* Wallace, 2 Speers, 193; Smith *v.* Walker, 1 Smedes & M. Ch. 432; Cleveland *v.* Worrell, 13 Ind. 545; Anderson Bridge Co. *v.* Applegate, id. 339; Blade *v.* Noland, 12 Wend. 173; Lazell *v.* Lazell, 12 Vt. 443; Moore *v.* Fall, 42 Maine, 450; Price *v.* Dunlap, 5 Calif. 483.

Mr. Justice *Story* sanctions this rule allowing actions at law on non-negotiable notes, "although," he adds, "it is not without some inconvenience." Story on Notes, § 451. The same author says, that, since "the proofs of the payment may disappear by lapse of time, or by accident, or by the death of witnesses, ... there would be no hardship in a rule of law which should require, even when the note is not negotiable, that it should either be given up, or a formal written receipt given of its being paid, or security given as an indemnity against a second payment to be required from the maker. Such, however, is not understood to be the positive requirement of our law." Story on Notes, § 106. See *infra,* p. 309, note *t.*

(*l*) Moore *v.* Fall, 42 Maine, 450.

(*m*) Hough *v.* Barton, 20 Vt. 455; McNair *v.* Gilbert, 3 Wend. 344; Edgell *v* Stanford, 6 Vt. 551.

(*n*) Pintard *v.* Tackington, 10 Johns. 104; McNair *v.* Gilbert, 3 Wend. 344; Blade *v.* Noland, 12 Wend. 173; Depew *v.* Wheelan, 6 Blackf. 485; Dean *v.* Speakman, 7 id. 317; Chandron *v.* Hunt, 3 Stew. 31; Lazell *v.* Lazell, 12 Vt. 443; Hough *v.* Barton, 20 id. 455.

Indeed, even though the lost note were indorsed in blank, this fact alone does not prove the note to be negotiable, for notes not strictly negotiable are often indorsed that way.(*o*) But it would seem as if notes indorsed in blank ought to be taken *prima facie* to be considered negotiable, so as, if not rebutted, to bar the remedy at law, in courts where their negotiability would create this bar.

The reason which permits notes never negotiable to be sued under the expeditious forms of common law, in preference to the more tedious and expensive ones of chancery, applies equally well to all notes which, being negotiable, have not been negotiated, or which, being negotiated, have been specially indorsed to a party to whom alone they are payable.(*p*)

But this extension of the principle is only allowed in this country, though formerly it was so held in England.(*q*) In England the courts have confined the legal remedy to notes not originally negotiable.(*r*) Hence, if a plaintiff who sues on

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(*o*) Hough *v.* Barton, 20 Vt. 455.

(*p*) Pintard *v.* Tackington, 10 Johns. 104; Rowley *v.* Ball, 3 Cowen, 303; Whitesides *v.* Wallace, 2 Speers, 193; Lazell *v.* Lazell, 12 Vt. 443; Hough *v.* Barton, 20 id. 455; Aborn *v.* Bosworth, 1 R. I. 401; Chaudron *v.* Hunt, 3 Stew. 31; Branch Bank at Mobile *v.* Tillman, 12 Ala. 214; Depew *v.* Wheelan, 6 Blackf. 485; Bean *v.* Keen, 7 id. 152; Dean *v.* Speakman, id. 317; Templin *v.* Krahn, 3 Ind. 373; Moore *v.* Fall, 42 Maine, 450; Torrey *v.* Foss, 40 id. 74; Patton *v.* State Bank, 2 Nott & McC. 464; White *v.* Brown, 19 Conn. 577; Fitch *v.* Bogue, id. 285; Lamson *v.* Pfaff, 1 Handy, 449.

(*q*) Rolt *v.* Watson, 4 Bing. 273, 12 J. B. Moore, 510; Long *v.* Bailie, 2 Camp. 214, note; Flight *v.* Brown, 2 Tyrw. 312. In Rolt *v.* Watson, the defendant had accepted a bill payable at three months to his order, for the amount of goods he had purchased. The seller lost the bill, not having indorsed it, and became bankrupt. *Best*, C. J. said: "The question for us, therefore, is, whether the bill which the defendant in this cause has accepted be an instrument which can ever rise in judgment against him. Now the jury have found expressly that the bill was unindorsed, and, though payable three months after date, it has not been heard of from 1825 to 1827. There is no decision in which the party has been held to be responsible in respect of an outstanding bill unindorsed. In all the cases in which a defendant has been holden to be discharged, in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him." *Park*, *Burrough*, and *Gaselee*, JJ. concurred, and the action was sustained. This case has been overruled in England, but not in America. We know of no sufficient reason why an action at law should not be allowed in all cases where the defendant will not be liable to any future holder into whose hands the note may come.

(*r*) Ramuz *v.* Crowe, 1 Exch. 167; Crowe *v.* Clay, 9 Exch. 604; Price *v.* Price, 16 M. & W. 232, 243. The plaintiff in Ramuz *v.* Crowe was the drawer of a bill of exchange, payable to his own order, and accepted by the defendant. The latter pleaded

a lost negotiable bill should prove that it had never been indorsed, and that it was not transferable except by indorsement, nor capable of being sued against the defendant by any other person than the plaintiff, the English court at law would, formerly at least, if not at present, give judgment for the defendant.

On similar grounds, if an action is brought upon a note transferable by mere delivery, and the plaintiff proves that he has lost it in some way, and then he traces it into the possession of the defendant, there seems to be no reason why he may not now — and even without notifying the defendant to produce it(*s*) — substitute a copy, on proof of its contents, for the note itself, and sue it at law.(*t*) For it can never be ne-

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that the plaintiff was not the holder or possessor of the bill, and that it was lost. The plaintiff replied with the loss; that the bill had never been indorsed by him, nor was it transferable by delivery, or capable of being put in suit against the defendant by any other person than the plaintiff; that until the loss he was always the holder, and was now alone entitled to be the holder thereof, and to receive its amount; and that the defendant, before the suit, had due notice of the premises. This replication, on demurrer, was held to be insufficient, and the plaintiff did not recover. The strict rule requiring production of an unnegotiated bill sued on was reaffirmed, on the *obiter* reasoning of Hansard *v.* Robinson, 7 B. & C. 90, and Rolt *v.* Watson, 4 Bing. 273, was overruled. In Clay *v.* Crowe, 8 Exch. 295, the more liberal rule was adopted; but this decision was reversed in Crowe *v.* Clay, 9 Exch. 604 (1854), and Ramuz *v.* Crowe reaffirmed. See also Powell *v.* Roach, 6 Esp. 76. The Scotch law on this point is more allied to the American, and to the overruled cases of Long *v.* Bailie, 2 Camp. 214, note, and Rolt *v.* Watson. Forbes, Bills, 28; Thomson, Bills, 320.

(*s*) In general, where a note or bill is traced to the wrongful possession of the defendant, and the owner may bring trover for its recovery, no notice to produce the note seems to be required, but secondary evidence may be introduced of its contents at once. Hammond *v.* Plank, Peake's Add. Cas. 90; How *v.* Hall, 14 East, 274; Bucher *v.* Jarratt, 3 B. & P. 143; Read *v.* Gamble, 10 A. & E. 597, note *a*, 5 Nev. & M. 433; Burton *v.* Payne, 2 Car. & P. 520; U. S. *v.* Britton, 2 Mason, 464; John *v.* John, Wright, 584; Gray *v.* Kernahan, 4 Const. R. 65; M'Clean *v.* Hertzog, 6 S. & R. 154; Garlock *v.* Geortner, 7 Wend. 198; Hammond *v.* Hopping, 13 id. 505; People *v.* Holbrook, 13 Johns. 90; Robinson *v.* Curry, 6 Ala. 842. See also the cases in note *u*, *infra*. The ground is, that the form of action itself gives the defendant notice that the papers must be produced, in order to falsify the plaintiff's claim. Hence in actions where the pleadings do not give such substantive notice, the general rule requiring notice would seem to apply. Paterson *v.* Hardacre, 4 Taunt. 114; M'Clean *v.* Hertzog, *supra*; Rhodes *v.* Moseley, 6 Fla. 12. On notice to produce, as affecting secondary evidence of a missing bill, see Goodered *v.* Armour, 3 Q. B. 956, 3 Gale & D. 206; Marfield *v.* Davidson, 8 Gill & J. 209.

(*t*) A note in defendant's possession cannot be sued in equity, because there is a perfect remedy at law. And if the note is alleged in a bill in equity to be "lost or mislaid," and turns out to be in the defendant's possession, who claims it as a gift or otherwise, the allegation, in England, is bad in form. Cooke *v.* Darwin, 18 Beav. 60. See also Anderson Bridge Co. *v.* Applegate, 13 Ind. 339.

gotiated as against the defendant, but by his own act or concurrence. So, wherever an acceptor or other party has wrongfully got possession of a bill of exchange or note, an action may be had against him, as such party to the paper, at common law.(*u*)

So, too, even in an action on a negotiable note, if the plaintiff can prove that the note is *destroyed*, the same conclusion as in the three preceding exceptions would seem to be irresistible. For that which has no existence certainly cannot be negotiated. As a question of fact, it may be true that it will generally be difficult to prove with certainty the absolute destruction of the note; but that proof is sufficient which is strong enough to satisfy a jury.

If it be shown that the plaintiff destroyed the note himself, either by carelessness, mistake, or accident, the case will become liable to extreme suspicion, and his honesty would need to be established, if possible, by the clearest proof. If the plaintiff have deliberately or voluntarily destroyed the note, it is said that secondary evidence is inadmissible, and he cannot recover.(*v*) But we should say he ought to be permitted to recover in such case, if he is able to prove clearly that it was only through mistake or ignorance that he destroyed the paper.(*w*)

In America, a recovery is allowed at common law wherever the note is proved to be destroyed.(*x*) And so it was formerly

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(*u*) Bull. N. P. 33 b, notes; Smith *v.* M'Clure, 5 East, 476; Miller *v.* Race, 1 Burr. 452; Knight *v.* Legh, 4 Bing. 589; Bleaden *v.* Charles, 7 id. 246; Fancourt *v.* Bull, 1 Bing. N. C. 681; Cranch *v.* White, 1 id. 414; Paterson *v.* Hardacre, 4 Taunt. 114; Haynes *v.* Foster, 4 Tyrw. 65; Goggerley *v.* Cuthbert, 5 Bos. & P. 170; Atkins *v.* Wheeler, id. 205; De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385; Symonds *v.* Atkinson, 1 H. & N. 146, 37 Eng. L. & Eq. 585; Gray *v.* Kernahan, 4 Const. R. 65; Garlock *v.* Geortner, 7 Wend. 198; Murray *v.* Burling, 10 Johns. 172; Buck *v.* Kent, 3 Vt. 99; Decker *v.* Mathews, 2 Kern. 313; Lamb *v.* Moberly, 3 T. B. Mon. 179.

(*v*) Angel *v.* Felton, 8 Johns. 149; Vanauken *v.* Hornbeck, 2 Green, N. J. 178; Fisher *v.* Mershon, 3 Bibb, 527.

(*w*) Clarke *v.* Quince, 3 Dowl. 26, where the defendant tore his own note signed by him, a copy sworn to was admitted to be good evidence to prove it. Anonymous, 1 Ld. Raym. 731. See other cases cited *infra*, p. 314, note *o*.

(*x*) Hinsdale *v.* Bank of Orange, 6 Wend. 378; Blade *v.* Noland, 12 id. 173; Rowley *v.* Ball, 3 Cowen, 303; Pintard *v.* Tackington, 10 Johns. 104; Chaudron *v.* Hunt, 3 Stew. 31; McNair *v.* Gilbert, 3 Wend. 344; Whitesides *v.* Wallace, 2 Speers, 193; Angel *v.* Felton, 8 Johns. 149; Bank of U. S. *v.* Sill, 5 Conn. 106; Hough *v.* Barton, 20 Vt 455; Walton *v.* Adams, 4 Calif. 37; Price *v.* Dunlap, 5 id. 483; Swift

in England.(*y*) More recent cases in that country sent the plaintiff to equity, even though he could satisfy a jury of the destruction of his bill, unless it be originally non-negotiable.

The ground on which this rule rests seems to be threefold. First, that he who pays a bill is entitled to receive it on payment, as his voucher of discharge. Secondly, that the proof of destruction cannot be absolute, and the bill may subsequently be found

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v. Stevens, 8 Conn. 431; Viles *v.* Moulton, 11 Vt. 470; Moore *v.* Fall, 42 Maine, 450; Ross *v.* Bank of Burlington, 1 Aikens, 43; Wright *v.* Jacobs, id. 304; Patton *v.* State Bank, 2 Nott & McC. 464; Aborn *v.* Bosworth, 1 R. I. 401; Dean *v.* Speakman, 7 Blackf. 317; Branch Bank at Mobile *v.* Tillman, 12 Ala. 214; Anderson Bridge Co. *v* Applegate, 13 Ind. 339; Littler *v.* Franklin, 9 id. 216; Bradley *v.* Long, 2 Strob. 160; Palmer *v.* Logan, 3 Scam. 56; Rogers *v.* Miller, 4 id. 333; Wade *v.* Wade, 12 Ill. 89; Des Arts *v.* Leggett, 5 Duer, 156, 16 N. Y. 582; Thayer *v.* King, 15 Ohio, 242. In Fisher *v.* Mershon, 3 Bibb, 527, a bill in equity lay to recover the amount of a note destroyed without fault of the holder. On destroyed bank-notes the bank must pay the amount, since the destruction does not alter its obligation. Wade *v.* N. O. Canal, &c. Co., 8 Rob. La. 140; Des Arts *v.* Leggett, *supra;* Bank of Louisville *v.* Summers, 14 B. Mon. 306 The sworn copy of a destroyed protest may be read in evidence. McGarr *v.* Lloyd, 3 Barr, 474 The destruction or loss of a "single bill" does not change its nature from a specialty to a parol contract. Myers *v.* Sealy, 5 Rich. Law, 473.

(*y*) Pierson *v.* Hutchinson, 2 Camp. 211; Mayor *v.* Johnson, 3 id 324; Champion *v.* Terry, 3 Brod. & B. 295, 7 J. B. Moore, 130; Dangerfield *v.* Wilby, 4 Esp. 159. So see a somewhat analogous case, Pearce *v.* Creswick, 2 Hare, 286. In Hansard *v.* Robinson, 7 B. & C. 90, in 1827, Lord *Tenterden* endeavored to establish the rule that proof of the destruction of a bill was not sufficient ground for the remedy at law. In that case, there was no allegation or evidence of destruction, and hence a part of the opinion may be considered *obiter*. It has been adopted, however, quite extensively in some quarters. Mr. Justice Story, quoting the passage just cited in his Prom. Notes, § 107, adds: "These considerations, although put in a mere interrogatory form, present the full stress of the argument against any right of the holder to require payment, or any duty on the part of the maker to make payment of such a negotiable note, alleged to be lost or destroyed, which may pass title by mere delivery." Ibid. § 108. Afterwards, repeating the point, he says: "A distinction has sometimes been taken between the case of a note's being lost, and the case of its being destroyed, and non-existent *in rerum natura*. In the latter case it has been thought that an action may be maintainable at law, since the destruction of the note takes away the possibility of its getting into the possession of any subsequent *bona fide* holder. But there is this remaining difficulty, that evidence which is merely presumptive may be offered of the destruction of the note, and then it may expose the maker to all the inconveniences of a subsequent second payment, if the note should subsequently reappear. And there is no more hardship in sending the holder into equity for redress in the case of the destruction of the note, than there is in the case of the loss of the note." Ibid. § 449. He adds, that "the reasoning of Lord Tenterden in Hansard *v.* Robinson applies equally as strongly to cases of the destruction of a note, as it does to the loss of a note" Ibid. note 1. But it seems to be firmly established, both in England and America, that a destroyed note may be sued at law. See notes *w* and *a*

and presented, though supposed to be destroyed. Thirdly, that the paper, if negotiable, may have been negotiated before its destruction, so that when destroyed it was the property of some one other than the plaintiff. But the old rule, which has always been the prevailing, if not the universal, law in America, that destroyed notes are suable at common law, is re-established. And it has been doubted whether equity has even a concurrent jurisdiction over such notes and bills.(*a*) In Scotland, destroyed notes can be sued without tender of indemnity.(*b*)

A fifth exception was formerly taken in England with respect to a bill indorsed in blank, and lost *after it has become due.* As the finder could not in that case give an effectual right of action even to an indorsee for value, and without notice, it would seem that the payor could not insist on indemnity against a future claim, and that accordingly the owner would have his remedy at law.(*c*) But this distinction was set aside, on the ground that the indorsee even of a note overdue would make out a *prima facie* case for recovery by proving the acceptance and indorsement, and that it would be hard to expose the acceptor, after payment of the bill without any indemnity, to the hazard of his inability to show by legal evidence that the bill had been lost after it became due.(*d*)

Accordingly, in England, whether the negotiable note be lost before or after it falls due, or even after presentment and demand, or after an express promise of the maker to pay, it is not suable at law. But some American courts adopt the distinction putting the case on the same ground with non-negotiable and destroyed notes, namely, that the maker is not liable again on the same note.(*e*)

(*a*) Woodford *v.* Whiteley, Moody & M. 517 (1830); Blackie *v* Pidding, 6 C. B. 196; Wright *v.* Maidstone, 1 Kay & J. 701. In this last case, the bill of exchange sued on was destroyed, and the argument was on a demurrer to the bill in equity, on the ground that there was a complete and adequate remedy at law. The demurrer was sustained. The Vice-Chancellor took occasion to pronounce the decision in Hansard *v.* Robinson, 7 B. & C. 90, a mere *dictum,* so far as the case of a destroyed bill was alluded to, and a *dictum* opposed to law.

(*b*) Thomson, Bills, 320.

(*c*) Glover *v.* Thompson, Ryan & M. 403; Long *v.* Bailie, 2 Camp. 214, note.

(*d*) Hansard *v.* Robinson, 7 B. & C. 90; Champion *v.* Terry, 7 J. B. Moore, 130, 3 Brod & B. 295; Woodford *v.* Whiteley, Moody & M 517; Crowe *v.* Clay, 9 Exch. 604, overruling Clay *v.* Crowe, 8 Exch. 295. See Price *v.* Price, 16 M. & W. 232.

(*e*) Thayer *v.* King, 15 Ohio, 242; Smith *v.* Walker, 1 Smedes & M. Ch. 432, 435; Chaudron *v.* Hunt, 3 Stew. 31. But see Rowley *v.* Ball, 3 Cowen, 303, 312.

It has also been stated, that, if a negotiable note put into circulation is lost before coming due, it must be shown that it was not indorsed; but this is not necessary in a note lost after falling due, since the equities would bar all future attempts to recover on it.(*f*) Finally, where the debt will be barred by the Statute of Limitations from any future claim, an action on the lost note may be had at law.(*g*)

Concerning the appropriate remedy on a note or bill negotiable by delivery, which is mislaid or lost, and not proved to be destroyed, there has been much conflict of opinion. But in England it is clearly settled — and, indeed, there were never any authoritative cases at law to the contrary (*h*) — that a lost bill or note payable to bearer cannot be sued at law.(*i*) And this is now equally true, whether the note be payable to bearer or order, and even though the loss occurred after it fell due,

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(*f*) Sloo *v.* Roberts, 7 Ind. 128.

(*g*) Torrey *v.* Foss, 40 Maine, 74; Moore *v.* Fall, 42 id. 450. The action at law is permitted in Maine whenever the defendant "is not exposed to danger from the claim of an actual holder, other than the plaintiff." Ibid.

(*h*) The cases relied on by counsel in Hansard *v.* Robinson, 7 B. & C. 90, in opposition to the rule, were Hart *v.* King, 12 Mod. 310; Glover *v.* Thompson, Ryan & M. 403; Brown *v.* Messiter, 3 Maule & S. 281. But of these, as it was proved, the first does not show that the bill was negotiable; the second was undefended; see id. 404, note; and in the third, the rule was made absolute by a single judge. But there was no relief formerly at equity on lost notes, on the ground that the loser had a complete remedy at law. Walmsley *v.* Child, 1 Ves. Sr. 341; Mossop *v* Eadon, 16 Ves. Jr. 430: Glynn *v.* Bank of England, 2 Ves. Sr. 38. In this last case, Lord *Hardwicke* said: "A man is not entitled to bring a bill in equity, in general, for a satisfaction upon a note lost. . . . . For, if lost, he may recover at law thereon. There may be circumstances, indeed, in which he may be entitled to come into equity in a case of this kind; but this is, in general, barely on the loss of a note." But this opinion has been overruled. See note *i*.

(*i*) Hansard *v.* Robinson, 7 B. & C. 90, 9 Dowl. & R. 860; Pierson *v.* Hutchinson, 2 Camp. 211, 6 Esp. 126; Powell *v.* Roach, id. 76; Poole *v.* Smith, Holt, N. P. 144; Dangerfield *v.* Willby, 4 Esp. 159; Mayor *v.* Johnson, 3 Camp. 324; Ex parte Greenway, 6 Ves. Jr. 812; Davis *v.* Dodd, 4 Taunt. 602, Wils. Exch. 110; Champion *v.* Terry, 3 Brod. & B. 295, 7 J. B. Moore, 130; Wain *v.* Bailey, 10 A. & E. 616, 2 Per. & D. 507; Leigh's N. P. 471; Clay *v.* Crowe, 8 Exch. 294; Crowe *v.* Clay, 9 id. 604; Ramuz *v.* Crowe, 1 id. 167; Price *v.* Price, 16 M. & W. 232; Rolt *v.* Watson, 12 J. B. Moore, 510, 4 Bing. 273; Long *v.* Bailie, 2 Camp. 214; Woodford *v.* Whiteley, Moody & M. 517; Blackie *v.* Pidding, 6 C. B. 196; Wright *v.* Maidstone, 1 Kay & J. 701; Macartney *v.* Graham, 2 Sim. 285. In Scotland, the amount need not be paid, unless the loss be established before a judge, and indemnity secured. But a lost bill is recoverable on such terms in Scotland, and the stricter English rule is not followed. Glen, Bills, 171; Forbes, 156.

and even though indemnity be offered at law. The ground is, that the party defendant can rightfully insist upon profert of the bill or note in suit; and that the party suing should be the actual holder; and furthermore, that while in equity the plaintiff could be required to furnish suitable indemnity to the defendant against being called upon to pay the lost note to any future *bona fide* holder for value, — a provision of vital importance to conducting the suit, — the common law had no such power of compulsion.(*j*) And equity is everywhere admitted to have jurisdiction of lost instruments, even in those States where a concurrent power is invested in law.(*k*)

In this country, courts of equity alone can furnish relief upon negotiable notes and bills lost before maturity, in most of the States in which law and equity are accurately distinguished, and where a court exists having full equity powers.(*l*) But other

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(*j*) Ex parte Greenway, 6 Ves. Jr. 812 The bill of exchange sued on had been lost after indorsement. Lord *Eldon* said: "To enable you to prove in respect of this bill, there must be a most extensive indemnity, ... a complete indemnity, going to all the consequences, against the holder, if the bill has not been paid, and that may be made by future possible holders if it should have been paid. . . . . But I never could understand by what authority courts of law compelled parties to take the indemnity."

(*k*) Ex parte Greenway, 6 Ves. Jr. 812; Walmsley *v.* Child, 1 Ves. Sr. 341; Glynn *v.* Bank of England, 2 id. 38; Mossop *v.* Eadon, 16 Ves. 433; Cockell *v.* Bridgeman, 4 Beav. 499; Davis *v.* Dodd, 4 Taunt. 602, 4 Price, 176, Wils. Exch. 110; Terrese *v.* Geray, Finch, 301; West *v.* Patton, Litt. Sel. Cas. 405; Smith *v.* Walker, 1 Smedes & M. Ch. 432; Smitherman *v.* Kidd, 1 Ired. Eq. 86; Fisher *v.* Carroll, 6 id. 485, 1 Jones, 27; Irwin *v.* Planters' Bank, 1 Humph. 145; Fisher *v.* Mershon, 3 Bibb, 527; Chewning *v.* Singleton, 2 Hill, Ch. 371; Crawford *v.* Summers, 3 J. J. Marsh. 300; Stout *v.* Ashton, 5 T. B. Mon. 251; Jackson *v.* Jackson, 6 Dana, 257; Allen *v.* State Bank of N. C., 1 Dev. & B. Eq. 3; Dumas *v.* Powell, 2 id. 122; Farmers' Bank of Va. *v.* Reynolds, 4 Rand. 186; Bank of Va. *v.* Ward, 6 Munf. 166; Wardlaw *v.* Gray, Dudley, Eq. 85. In Davis *v.* Dodd it was held, that the indorsee of a lost bill of exchange may compel payment of the acceptor in equity; although he might have recovered at law. And it is no answer to the suit that the bill of exchange was merely an accommodation bill; that the plaintiff might have applied before; or that the drawer has since become insolvent. And the plaintiff is not bound to institute the suit in equity within any particular period. See also Pearce *v.* Creswick, 2 Hare, 286. Green *v.* Stone, Walk. Ch. 109; *Story*, Eq. Jur. §§ 82, 83; 2 Rob. Prac. 40; Jeremy, Ch. Jur. 362. To give the Court of Chancery jurisdiction, it is not necessary that the note shall have been lost before maturity. Green *v.* Stone, Walk. Ch. 109; Chewning *v.* Singleton, 2 Hill, Ch. 371.

(*l*) Rowley *v.* Ball, 3 Cowen, 303; Kirby *v.* Sisson, 2 Wend. 550; Hinsdale *v.* Bank of Orange, 6 id. 378; Thayer *v.* King, 15 Ohio, 242; Cotton *v.* Beasly, 2 Murph. 259; Swift *v.* Stevens, 8 Conn. 431; Fitch *v.* Bogue, 19 id. 285; Branch Bank at Mobile *v.* Tillman, 12 Ala. 214; Chaudron *v.* Hunt, 3 Stew. 31; Posey *v.* Decatur Bank, 12 Ala.

States give relief at law, and find no difficulty in requiring the defendant to tender suitable indemnity in such a suit.(*m*)

Undoubtedly in England, and in such States as strictly adhere to the English distinctions of remedies, indemnity cannot be offered at law. But it may be questioned whether it is advisable for those States in this country to refuse the remedy at law on lost negotiable notes, in which the exclusive powers of equity are not so precisely insisted upon as in England. One of the reasons for refusing the remedy at law, to wit, the necessity of profert, and of the plaintiff's being the actual holder, is, as we have already said, merely technical and unimportant, when a good excuse for the want of it can be furnished. As to the second reason, the matter of indemnity, although one distinguished

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802; Edwards *v.* M'Kee, 1 Misso. 123; Smith *v.* Rockwell, 2 Hill, 482; Aborn *v.* Bosworth, 1 R. I. 401; and the American cases cited in note *k*, *supra*. In North Carolina, it seems that an action at law will be allowed, if the plaintiff can prove a loss by evidence of third parties. But if he rely on his own oath or affidavit, he must go to equity, as the indemnity which equity can give and law cannot is thought to balance the insecurity of allowing a plaintiff to prove his own case. Fisher *v.* Carroll, 6 Ired. Eq. 485, 1 Jones, 27; McRae *v.* Morrison, 13 Ired. 46; Allen *v.* State Bank, 1 Dev. & B. Eq. 3; Dumas *v.* Powell, 2 id. 122; Chaney *v.* Baldwin, 1 Jones, 78; Grant *v.* Reid, id. 512.

(*m*) Menendez *v.* Syndics of Larionda, 3 Mart. La. 236; Nagel *v.* Mignot, 7 id. 657; Id., 8 id. 488; Latapie *v.* Gravier, id. 316; Brent *v.* Ervin, 15 id. 303; Lewis *v.* Petayvin, 16 id. 4; Wade *v.* N. O. Canal, &c. Co., 8 Rob. La. 140; Northern Bank of Ky. *v.* Leverich, id. 207; Miller *v.* Webb, 8 La. 516; Lewis *v.* Splane, 2 La. Ann. 754; Peace *v.* Head, 12 id. 582; Bean *v.* Keen, 7 Blackf. 152; Dormady *v.* State Bank of Ill., 2 Scam. 236; Welton *v.* Adams, 4 Calif. 37; Price *v.* Dunlap, 5 id. 483; Meeker *v.* Jackson, 3 Yeates, 442; Bell *v.* Young, 1 Grant's Cas. 175; Waters *v.* Bank of State of Georgia, &c., R. M. Charlt. 193; Robinson *v.* Bank of Darien, 18 Ga. 65, 111; Bowman *v.* Smith, 1 Strob. 246; Commercial Bank *v.* Benedict, 18 B. Mon. 307; Union Bank *v.* Warren, 4 Sneed, 167; Anderson *v.* Robson, 1 Brev. 263; Peabody *v.* Denton, 2 Gallis. 351; Freeman *v.* Boynton, 7 Mass. 483; Jones *v.* Fales, 5 id. 101; Welsh *v.* Barrett, 15 id. 380, 384; Donelson *v.* Taylor, 8 Pick. 390; Page *v.* Page, 15 id. 368; Fales *v.* Russell, 16 id. 315; Foster *v.* Mackay, 7 Met. 531; Almy *v.* Reed, 10 Cush. 421; Willis *v.* Cresey, 17 Maine, 9; Vananken *v.* Hornbeck, 2 Green, N. J. 178; Bank of U. S. *v.* Sill, 5 Conn. 106; Hinsdale *v.* Miles, id. 331; Murray *v.* Carret, 3 Call, 373; Fulton Bank *v.* Phœnix Bank, 1 Hall, 562; Viles *v.* Moulton, 11 Vt. 470; Reynolds *v.* French, 8 id. 85; Leavitt *v.* Cowles, 2 McLean, 491; Renner *v.* Bank of Columbia, 9 Wheat. 581; Bisbing *v.* Graham, 14 Penn. State, 14; Page *v.* Page, 15 Pick. 368; Jackson *v.* Frier, 16 Johns. 193; Chamberlain *v.* Gorham, 20 id. 144; Church *v.* Flowers, 2 Root, 144; Hinsdale *v.* Bank of Orange, 6 Wend. 378; Bullet *v.* Bank of Penn., 2 Wash. C. C. 172; Martin *v.* Bank of U. S., 4 id. 253. "It has been repeatedly held in this court, that the act of 1828, giving the courts of common law jurisdiction of lost notes, is merely an affirmance of the common law." Bell *v.* Moore, 9 Ala. 823; Chandron *v.* Hunt, 3 Stew. 31; Porter *v.* Nash, 1 Ala. 452;

authority has said, "Whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge"; (*n*) and another, "I never could understand by what authority courts of law compelled parties to take the indemnity"; (*o*) we have seen that some American courts have found no difficulty in adjusting the indemnity satisfactorily in suits at law. (*p*)

A further consideration, which may have some weight, is, that if courts of law refuse the remedy, the owner of a lost note will very often get none at all. For some courts of chancery refuse to take jurisdiction of civil actions in which the sum recoverable does not exceed a specific amount, — a frequent minimum standard, where such a rule exists in America, being fifty dollars. It is obvious that a great number of lost notes are of much smaller value than this sum, and accordingly the owner of such a bill, if refused his remedy at law, would get none at all. (*q*)

A fourth remark is, that in England and most of those States in which the courts supported the exclusive remedy in

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Robinson *v.* Curry, 6 id. 842; Snodgrass *v.* Branch Bank, 25 id. 161. To these may be added the cases at law of notes lost after being once given in evidence, *infra*, p. 309, note *p*. But some of these cases, it is thought, may have been decided on the ground that "the loss was by the officers of the court, while the document was in the custody of the law." 2 Greenl. Ev. § 156, note.

(*n*) Lord *Ellenborough*, in Pierson *v.* Hutchinson, 2 Camp. 211.

(*o*) Lord *Eldon*, in Ex parte Greenway, 6 Ves. Jr. 812.

(*p*) *Supra*, note *m*. In Fales *v.* Russell, 16 Pick. 315, a negotiable note, indorsed in blank, was stolen from the holder before it was due. There was no evidence of destruction whatever. The court held, first, that the owner might, nevertheless, recover the amount from the maker, at common law, on indemnity; secondly, that "this court, as a court of law, has authority, in such case, to prescribe a reasonable security for the defendant's indemnification." In Union Bank *v.* Warren, 4 Sneed, 167, 171, the court said: "We likewise assent to the proposition maintained in Fales *v.* Russell, that, in the case of a lost bill or note, it is properly within the power of a court of law, on rendering judgment for the plaintiff, to annex the condition that, before availing himself of it, he shall execute to defendant a sufficient bond of indemnity. Such is the requirement of the act of 1819. But the authority of a statute is not necessary to the exercise of this power by a court of law. . . . . But the jurisdiction at law cannot be seriously questioned."

(*q*) Thus, in Chaney *v.* Baldwin, 1 Jones, N. Car. 78, the plaintiff lost a note for $ 47.00, and offered to prove the loss by his own oath, and to swear he had no other means of proving it. He admitted that the technical remedy was in equity, but pleaded the rule of the latter court not to give relief on an amount of less than $ 50.00. But the court said, "It is a new idea, that courts of law take jurisdiction, because the plaintiff is 'without remedy, save in this honorable court,'" — and the plaintiff got no remedy from either court. See also Union Bank *v.* Warren, 4 Sneed, 167.

equity, a complete remedy at law is established by statute on lost negotiable bills and notes, and the law courts are found able to judge whether the indemnity is sufficient. This statute remedy is, in England, the 17 & 18 Vict. c. 125, § 87, which provides that "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court, or judge, or a master, against the claims of any other person upon such negotiable instrument." It is only upon the application of a plaintiff, to prevent a defendant from setting up the loss of the bill, that a judge has any jurisdiction under the 87th section of this statute.(*r*)

Similar provisions have been enacted in New York,(*s*) and in

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(*r*) Aranguren *v.* Scholfield, 1 H. & N. 494, 38 Eng. L. & Eq. 424. Hence, where the defendant alleges the loss, and undertakes to pay the debt and costs, on indemnity, the judge has no power to order at once a stay of proceedings till it be given; for that would be preventing the plaintiff from trying the question of loss. Id.

(*s*) The New York statute is: "In any suit founded upon any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defence of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and, notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced. But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs, and personal representatives, against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim." 2 R. S., Part III. Ch. VII. tit. 3, art. 8, §§ 94, 95, 96, 3d ed. This statute applies only to the remedy, and in no way affects the rights or liabilities of the parties arising out of the proceedings to charge the drawer or indorser. Any defences on this latter ground are still as available under the statute remedy as under the former equitable remedy. Edwards, Bills, 296; Smith *v.* Rockwell, 2 Hill, 482. A check is a bill of exchange within the meaning of this statute. Jacks *v.* Darrin, 3 E. D. Smith, 548; Jacks *v.* Darrin, id. 557. The statute applies, although the bill, note, or check be lost after the action is commenced. Id. But the statute applies only to lost notes. Upon a note accidentally destroyed, an action may be had without indemnity, "for a destroyed note cannot be in the hands of a *bona fide* holder." Des Arts *v.* Leggett, 16 N. Y. 582, 5 Duer, 156. But under this New York statute, though the loser has his remedy at law, an assignee after loss must resort to equity, not to the statute. Smith *v.* Young, 2 Barb. 545. The statute also declares that any drawee who shall destroy a bill, or refuse, within twenty-four hours after delivery for acceptance, or within such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same.

many other States, as in Tennessee,(*t*) Mississippi,(*u*) Missouri,(*v*) Virginia, Alabama,(*w*) Kentucky,(*x*) Georgia,(*y*) Louisiana,(*z*)

(*t*) The Tennessee act of 1819, ch. 27, § 1, gives a court of law jurisdiction against an indorser upon a lost indorsement. Union Bank *v.* Osborne, 6 Humph. 318. And judgment will not be arrested for want of the affidavit of loss, if the defendant goes to trial, without objection, on the merits of the case. Id. See also Powers *v.* Fitzhugh, 10 Humph. 415; Carter *v.* Vaulx, 2 Swan, 639. This statute embraces the case of a severed bank-note, transmitted by mail. But, independently of the statute, an action at law is permitted in Tennessee on any lost note or bill. Union Bank *v.* Warren, 4 Sneed, 167.

(*u*) In Mississippi, an action at law will lie upon a lost negotiable note, since the statute subjecting the holder of such a note to all the equities between the original parties. Clark *v.* Reed, 12 Smedes & M. 554.

(*v*) The Missouri statute requiring affidavit to be made upon lost notes, does not require the words by accident to be used. The word "lost" is sufficient. Harryman *v.* Robertson, 3 Misso. 449.

(*w*) In Virginia and Alabama, statutes have authorized a resort either to law or equity for the payment of a lost negotiable note. Shields *v.* Commonwealth, 4 Rand. 541; Farmers' Bank of Va. *v.* Reynolds, id. 186; Posey *v.* Decatur Bank, 12 Ala. 802; Tindall *v.* Childress, 2 Stew. & P. 250; Robinson *v.* Curry, 6 Ala. 842. The Alabama statute is a cumulative remedy only, and hence the loss of a note may be proved by other testimony than the statute affidavit. Branch Bank at Mobile *v.* Tillman, 12 Ala. 214. Under that statute, the indorsement on the writ cannot be looked to to show that the action is upon a lost note. Stephenson *v.* Roper, 5 Ala. 182; and the loss does not authorize a plaintiff to aver the dates of the note uncertainly, such a declaration being bad on demurrer. Porter *v.* Nash, 1 Ala. 452. See the same point in Bradley *v.* Long, 2 Strob. 160. If the note lost be found before trial, it may be read to the jury, though the action was brought with affidavit of the loss. Carlisle *v.* Davis, 7 Ala. 42. The omission of the affidavit is available on demurrer. Bell *v.* Moore, 9 Ala. 823, except where the bill is traced to the tortious possession of the defendant. Robinson *v.* Curry, 6 Ala. 842.

(*x*) The early Kentucky statute was once considered to have dispensed not only with proof of a note sued on when lost, but even its production at all, unless the defendant denies the signature, &c. on oath, with his plea. Scott *v.* Cleaveland, 3 T. B. Mon. 62; Cope *v.* Arberry, 2 J. J. Marsh. 296; M'Gee *v.* Donaphan, 2 Littell, 139. But the true construction of the statute provision is given in Sebree *v.* Dorr, 9 Wheat. 558. The present Civil Code, § 6, embraces the case of a lost half of a bank-note. Commercial Bank *v.* Benedict, 18 B. Mon. 307. In Kentucky, no decree will be granted against a non-resident, without proof of the date of the lost note. Hill *v.* Lackey, 9 Dana, 81.

(*y*) The Georgia act of 1856 simply declares that the copy shall be sworn to, without saying by whom. Banks *v.* Dixon, 24 Ga. 483.

(*z*) The Louisiana Civil Code, 312, art. 247, admits parol proof of the contents of a note, "when the creditor (according to the English text) has lost it through a fortuitous event, an unforeseen accident, *or* overpowering force." "Lorsqu'il a perdu le titre (in the French), par suite d'un cas fortuit, imprévu, *et* resultant d'une force majeure." Nagel *v.* Mignot, 7 Mart. La. 657, 8 id. 488. This case contains an elaborate discussion upon the meaning of the statute just cited.

Michigan,(*a*) and Iowa.(*b*) These provisions secure the action at law upon lost negotiable paper, upon tendering a bond of indemnity, and after parol proof of the contents. Upon the whole, therefore, we may conclude that this form of remedy is, in most places, pretty thoroughly established.

Tender of indemnity is, as we have before said, everywhere a strict pre-requisite to recovery upon a lost note, both at law and in equity,(*c*) provided the defendant claims it.(*d*) All the statutes accordingly provide that an indemnity shall be tendered in a suit at law, and frequently the provision requires indemnity upon notes lost after due, as well as upon those lost before due; and not only against the actual amount the payor may be called upon to pay to a *bona fide* holder, but also against all costs and damages. It is true that, to charge the indorser of a lost promissory note, the owner should tender indemnity to him and the maker at the time of demand and notice.(*e*) But neglect to offer indemnity to the maker on demand of payment, does not deprive the payee of his right of action. It will, however, prevent him from recovering costs, and will compel him to pay special damages resulting from the neglect, in his subsquent suit.(*f*) The court, of course, determines the proper amount of the in-

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(*a*) The Michigan statute is, R. S. ch. 102, § 88, p. 460. As to what is sufficient evidence of loss under the statute, to admit parol evidence, see Higgins *v.* Watson, 1 Mich. 428.

(*b*) Under the Iowa statute regulating proceedings before justices of the peace, R. S. p. 313, § 6, the owner of a negotiable note may prove its loss, and recover from the maker. White *v.* Mallord, Morris, 494. See Temple *v.* Gove, 8 Iowa, 511.

(*c*) Edwards says the distinction between the remedies at law and in equity is "one of degree and practice rather than principle," because indemnity is required under both. Edwards, Bills, 299.

(*d*) Tercese *v.* Gerny, Finch, 301; Hansard *v.* Robinson, 7 B. & C. 90; Ex parte Greenway, 6 Ves. Jr. 812; Davis *v.* Dodd, 4 Taunt. 602; Freeman *v.* Boynton, 7 Mass. 483; Donelson *v.* Taylor, 8 Pick. 390; Fales *v.* Russell, 16 id. 315; Meeker *v.* Jackson, 3 Yeates, 442; Fisher *v.* Carroll, 6 Ired. Eq. 485; Chancy *v.* Baldwin, 1 Jones, N. Car. 78; Almy *v.* Reed, 10 Cush. 421. See also the Louisiana cases, *supra*, p. 298, note *m*. Indemnity is required also in the case of a lost bank-note. See *infra*, p. 308, note *n*. The indemnity should be not only for all future liability upon the bills, but also against the past, should it turn out that these bills had already been presented, and taken up, and destroyed. Robinson *v.* Bank of Darien, 18 Ga. 65, 111.

(*e*) Smith *v.* Rockwell, 2 Hill, 482. But the indemnity may be waived at presentment for payment, and then the defence ceases. Id.

(*f*) Allen *v.* State Bank of N. C., 1 Dev. & B. Eq. 3; Farmers' Bank of Va. *v.* Reynolds, 4 Rand. 186; Commercial Bank *v.* Benedict, 18 B. Mon. 307. See also Mossop *v.* Eadon, 16 Ves. 430.

demnity.(*g*) And it has been held that the bond of indemnity should run to all the defendants, though some have not been served with process.(*h*)

But in some suits upon lost instruments there is obviously no risk run by the defendant, and hence no call for indemnity. Thus, if the contents of the note be proved, and it be shown that the defendant is protected under the Statute of Limitations from future liability, no indemnity can be demanded.(*i*) For the same reason, no bond of indemnity is generally given in this country upon a non-negotiable note, or a negotiable note if it be a note specially indorsed.(*j*) And the court has no authority to dismiss an action, properly commenced and legally pending, because the plaintiff has not already tendered the statute bond of indemnity.(*k*) So there is no indemnity where the destruction of the note is abundantly proved.(*l*) Still, the case must not be doubtful, or else indemnity will be required.(*m*) So, too, no security is needful when the note is traced to the custody of the defendant.(*n*) And when the execution of the note is

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(*g*) So see 17 & 18 Vict., ch. 125, § 87, *supra*. A defendant who disputes its sufficiency will, according to an English case, if the master finds it sufficient, be ordered to pay the costs subsequent to the original hearing.

(*h*) Higgins *v.* Watson, 1 Mich. 428.

(*i*) Torrey *v.* Foss, 40 Maine, 74; Moore *v.* Fall, 42 id. 450. The case of Poole *v.* Smith, Holt, N. P. 144, cited *supra*, p. 286, note *u*, was decided otherwise.

(*j*) See the cases cited p. 290, note *k*, and p. 291, note *p*. The payor may suffer, as we have said, not only directly, by paying the amount again to a *bona fide* holder, but also by being unable to disprove that *prima facie* title to a bill which its mere possession insures. In some jurisdictions, however, the possible damage of a subsequent suit is too remote for indemnity, which, accordingly, will not be required where the bill is non-negotiable, destroyed, charged with equities, or, in brief, in such condition that no second suit upon it appears maintainable at the time. Rolt *v.* Watson, 4 Bing. 273; Thayer *v.* King, 15 Ohio, 242; Lamson *v.* Pfaff, 1 Handy, 449. It is said that, in a suit upon such a bill in Scotland, the plaintiff would probably be compelled also to find surety that he will not indorse the instrument to a third party, if found. There is no such prerequisite, of course, in this country or in England, as an indorsement after maturity subjects the indorsee to precedent equities. Thomson, Bills, 320.

(*k*) Aranguren *v.* Scholfield, 1 H. & N. 494, 38 Eng. L. & Eq. 424; Moore *v.* Fall, 42 Maine, 450. "If the evidence of loss, &c. was insufficient, the defendant may have been entitled to a verdict in his favor, but not to the dismissal of the action." Moore *v.* Fall, *supra*.

(*l*) Bank of Louisville *v.* Summers, 14 B. Mon. 306; Rowley *v.* Ball, 3 Cowen, 303; Hinsdale *v.* Bank of Orange, 6 Wend. 378; Blade *v.* Noland, 12 id. 173; Des Arts *v.* Leggett, 16 N. Y. 582, 5 Duer, 156.

(*m*) Des Arts *v.* Leggett, 5 Duer, 156.

(*n*) See *supra*, p. 193, note *u*.

proved, and also that it was protested, and afterwards returned to the plaintiff, he need offer no indemnity, because an indorsee would palpably acquire the note subject to all precedent equities.(*o*) And, in short, the American rule upon indemnity is simply that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then. It has, nevertheless, in some jurisdictions, been thought best, upon the whole, to require indemnity in all cases, whether the note be alleged to be lost or destroyed, notwithstanding its occasional hardship and inconvenience.(*p*)

Such are some of the leading and more general principles which belong to the subject of lost notes and bills. It remains to speak of the evidence and the pleadings in special cases.

Before a copy of a lost note can be received in evidence, as a general rule, the existence and loss or destruction of the original must be proved.(*q*) And if the evidence of destruction is not conclusive, the plaintiff must generally show that diligent search has been made for it, in those places where it would be most likely to be found, if in existence.(*r*) What is reasonable search will depend upon the nature and contents of the instrument, and the loser's affidavit may testify to his personal diligence.(*s*)

The plaintiff's oath or affidavit, addressed to the court, is admissible to prove the loss of a note or bill, so as to lay the foundation for the introduction of secondary evidence of its execution and contents; but this testimony should be by affidavit, and must be addressed to the court alone. For the question whether the loss or destruction is proved is not for the jury, and the plaintiff's affidavit upon that point cannot go to the jury.(*t*)

(*o*) Brent *v.* Ervin, 15 Mart. La. 303.

(*p*) Welton *v.* Adams, 4 Calif. 37; Price *v.* Dunlap, 5 id. 583; Wade *v.* New Orleans Canal, &c. Co., 8 Rob. La. 140.

(*q*) Miller *v.* Webb, 8 La. 516; Farmers' Bank of Va. *v.* Reynolds, 4 Rand. 186; Bell *v.* Young, 1 Grant's Cas. 175; Palmer *v.* Logan, 3 Scam. 56; Grimes *v.* Talbot, 1 A. K. Marsh. 205.

(*r*) M'Gahey *v.* Alston, 2 M. & W. 206; Foster *v.* Mackay, 7 Met. 531; Viles *v.* Moulton, 11 Vt. 470; Palmer *v.* Logan, 3 Scam. 56; Rogers *v.* Miller, 4 id. 333; Spalding *v.* Bank of Susquehanna Co., 9 Penn. State, 28; Bell *v.* Young, 1 Grant's Cas. 175; Templin *v.* Krahn, 3 Ind. 373; Herndon *v.* Givens, 16 Ala. 261; Peace *v.* Head, 12 La. Ann. 582.

(*s*) Page *v.* Page, 15 Pick. 368; Cleveland *v.* Worrell, 13 Ind. 595.

(*t*) Meeker *v.* Jackson, 3 Yeates, 442; Dormady *v.* State Bank of Ill., 2 Scam. 236;

The affidavit of existence, of loss, and of the correctness of the copy, may be made by the party, or by any one else who best knows the facts.(*u*) Hence it may be made, for example, by the representatives of a deceased payee.(*v*)

In North Carolina, the distinction between the jurisdictions of law and equity over lost notes turns much upon this question of the plaintiff's affidavit, as well as upon indemnity. For since the proof of loss is ordinarily only to be made by the plaintiff himself, he must resort to a court where the defendant may be heard personally in reply. In that State this can only be done in chancery.(*w*)

The obvious grounds on which a plaintiff may put in his affidavit are, that, in general, he alone can be cognizant of the loss. No recourse could be had to the defendant, or ordinarily to third parties, and unless he could get relief upon his own affidavit, the plaintiff must be debarred from relief.(*x*) But though

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Bean *v.* Keen, 7 Blackf. 152; Palmer *v.* Logan, 3 Scam. 56; Wade *v.* Wade, 12 Ill. 89; Grimes *v.* Talbot, 1 A. K. Marsh. 205; McNiel *v.* McClintock, 5 N. H. 355, Hill *v.* Lackey, 9 Dana, 81; Cary *v.* Campbell, 10 Johns. 363; Chamberlain *v.* Gorham, 20 id. 144; Fisher *v.* Carroll, 6 Ired. Eq. 485; Fitch *v.* Bogue, 19 Conn. 285; Welsh *v.* Barrett, 15 Mass. 380, 384; Donelson *v.* Taylor, 8 Pick. 390; Page *v.* Page, 15 id. 368; Almy *v.* Reed, 10 Cush. 421; Miller *v.* Webb, 8 La. 516; Beachboard *v.* Luce, 22 Misso. 168; Boyle *v.* Arledge, Hemp. 620. Formerly, in Connecticut, the whole question of loss, signature, contents, &c. went before the jury. Coleman *v.* Wolcott, 4 Day, 388; Swift *v.* Stevens, 8 Conn., 431, and cases there cited. But the present rule is otherwise. Witter *v.* Latham, 12 Conn. 392; Fitch *v.* Bogue, 19 id. 285. In South Carolina, the plaintiff's affidavit of loss is not admissible, either at law or in equity. Davis *v.* Benbow, 2 Bailey, 427; Chewning *v.* Singleton, 2 Hill, Ch. 371; Drake *v.* Ramey, 3 Rich. 37. See also an early Vermont case, Wright *v.* Jacobs, 1 Aikens, 304. A diligent search shown is enough, in South Carolina, to prove *prima facie* the loss of a deed. Drake *v.* Ramey, *supra*. It has been held in one or two cases, that other circumstances must make the loss probable, if supported only by the plaintiff's oath. Lewis *v.* Splane, 2 La. Ann. 754. Hence, where there were badges of fraud, a copy of a bill and a notarial protest, with the payee's affidavit that the original was lost or mislaid, was not legal evidence to charge the drawer. Wright *v.* Hencock, 3 Munf. 521. The plaintiff can never testify to the jury as to the contents of the note. Burridge *v.* Geauga Bank, Wright, 688.

(*u*) Banks *v.* Dixon, 24 Ga. 483; Higgins *v.* Watson, 1 Mich. 428; Smith *v.* Young, 2 Barb. 545.

(*v*) Bell *v.* Young, 1 Grant's Cas. 175.

(*w*) See *supra*, p. 298, note *l*.

(*x*) Tayloe *v.* Riggs, 1 Pet. 591, 596. The rule requiring the plaintiff's affidavit is very stringent, and in some States, the statute makes it an absolute prerequisite to recovery under the statute remedy. See pp. 300–302. For the non-production of the note raises a presumption that it would not support the plaintiff's case, and he should

this affidavit is generally sufficient, yet when there is a dispute as to the execution and contents of the note, and the defendant makes oath that this is the ground why the plaintiff falsely alleges loss, the strictest proof of execution and contents will also be required.(*y*) But strict previous proof of loss is only required where circumstances are suspicious, and to repel any inference of fraudulent design in the loss or destruction. Accordingly, direct proof of loss is not required where the maker is protected against any future claim of a *bona fide* holder.(*z*) And in general, absolute proof of loss or destruction will not be demanded,(*a*) "courts of law," in the language of Lord Hardwicke, "not requiring, any more than courts of equity, strict and positive evidence of the loss; which, as it is generally occasioned by negligence, is seldom capable of being given." (*b*) But the original existence, the identity, and the genuineness of the lost note must be proved, if disputed.(*c*)

Presumptive evidence of the loss has been held sufficient, when the defendant admitted the existence of the note, and that it had not been paid.(*d*) And in a note not negotiable, it is said, a court should be satisfied with slight evidence of its being mislaid.(*e*) Lapse of time after the loss may also have an influence on the evidence, and may authorize an action at law; for when

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at least combat this presumption by his affidavit of loss. But the rule is not inflexible. See p. 305, notes *u* and *v*.

(*y*) Fisher *v.* Carroll, 6 Ired. Eq. 485.

(*z*) Swift *v.* Stevens, 8 Conn. 431.

(*a*) Walmsley *v.* Child, 1 Ves. Sr. 341; Cockell *v.* Bridgeman, 4 Beav. 499; Angel *v.* Felton, 8 Johns. 149; Shaver *v.* Ehle, 16 id. 201; Peabody *v.* Denton, 2 Gallis. 351; White *v.* Brown, 19 Conn. 577; Eagle Bank *v.* Smith, 5 id. 71; Littler *v.* Franklin, 9 Ind. 216; Burton *v.* Dees, 4 Yerg. 4.

(*b*) Walmsley *v.* Child, 1 Ves. Sr. 341.

(*c*) Jackson *v.* Jackson, 6 Dana, 257; Burridge *v.* Geauga Bank, Wright, 688; Latapie *v.* Gravier, 8 Mart. La. 316. Though on a destroyed note, the strictest proof of these facts is not essential, but only enough to satisfy a jury. Bradley *v.* Long, 2 Strob. 160. And wherever proof of the original, if it existed, would not be required, it is not necessary to let in parol proof of a note lost or destroyed. Palmer *v.* Logan, 3 Scam. 56. Where a bailee carelessly loses a note, he cannot require strict proof of its identity, in defending a suit by its owner, because by his own negligence he has placed it out of the plaintiff's power to thoroughly identify it. Sandefur *v.* Mattingley, 16 Ark 237 As to the process of proving the tenor in Scotland, see Thomson, Bills, 319; Tait on Evid. 204.

(*d*) Lewis *v.* Petayvin, 16 Mart. La 4.

(*e*) Nagel *v.* Mignot, 8 Mart. La. 488.

a note has been lost for a number of years, and nothing heard from it, there is strong ground for believing that, if not destroyed, at least it will never be heard of again.(*f*)

It is not necessary for a creditor to prove that a debt evidenced by a lost paper is not paid. The *onus probandi* rests on him who alleges payment.(*g*) It has been held, that in debt by an assignee against a maker, plaintiff must prove by disinterested witnesses not only the contents of the lost note, but also that there was on it an indorsement to himself.(*h*) We have already stated that proof of destruction is not necessary to maintain the action.(*i*)

If a bill is proved to have been lost after protest, a duplicate protest may be offered in evidence, without producing the original bill.(*j*) And so may a duplicate notarial copy of a bill accompanying its protest. Still, the loss must be proved, not averred merely, before the notarial copy is received.(*k*) But a notarial copy is never necessary evidence at all, without previous positive proof that the note was protested.(*l*) So a letter, enclosing a duplicate of another letter alleged to have been previously sent, and which purported to contain the original bill

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(*f*) Champion *v.* Terry, 3 Brod. & B. 295; Peabody *v.* Denton, 2 Gallis. 351; Swift *v.* Stevens, 8 Conn. 431; Foster *v.* Mackay, 7 Met. 531; Torrey *v.* Foss, 40 Maine, 74; Templin *v.* Krahn, 3 Ind. 373. In Peabody *v.* Denton, eighteen years had elapsed between the loss of the note and the suit. *Story*, J. said that it must be presumed that no demand from a *bona fide* holder would now be made.

(*g*) Bell *v.* Young, 1 Grant's Cas. 175.

(*h*) Bean *v.* Keen, 7 Blackf. 152. If the acceptor have treated the plaintiff as its holder, proof by a witness of the payee's acknowledgment that he had transferred the bill to the plaintiffs, has been held sufficient evidence of title; though if the bill itself could be produced, such slight and secondary evidence might not suffice. Northern Bank of Kentucky *v.* Leverich, 8 Rob. La. 207.

(*i*) This question was fully examined by the Supreme Court of the United States in Renner *v.* Bank of Columbia, 9 Wheat. 581.

(*j*) Usher *v.* Gaither, 2 Harris & McH. 457.

(*k*) Wright *v.* Hencock, 3 Munf. 521.

(*l*) "It is objected, in the second place, that if secondary evidence is admissible, the contents of the note was not proved by that which was competent; that it should have been by a notarial copy. Proof of the contents of a lost paper ought to be the best the party has it in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But to have required a notarial copy would have been demanding that of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protected." Renner *v.* Bank of Columbia, 9 Wheat. 581, 597.

of exchange, is admissible in evidence to prove the loss of the original.(*m*)

Lost bank-notes and checks are subject to actions for their amounts, in like manner as ordinary notes and bills. Hence, when a bank-note is proved to be destroyed, the bank must pay its amount. But when the owner alleges its loss, the bank may refuse to pay without tender of indemnity.(*n*)

The profert of a negotiable bill or note given in payment of a debt, whether simultaneous or antecedent, may be necessary in an action on the debt, as in one on the bill. Hence the creditor, in suing on the original contract, when such a note has been given, must either produce the bill or account for its non-production, whenever the note itself would have been held, *prima facie*, as payment of the bill. Hence, in such an action, the plaintiff is subjected to the rules of evidence and pleading which we have hitherto considered, and must tender indemnity in like manner, since the debtor is put to the same inconvenience by an action on the debt as he would be by an action on the lost note or bill.(*o*) But whenever the creditor can put the debtor into the same position, as to his right and liabilities on the note, as if it were returned to him, the claim of the former on the original consideration revives, if the note itself were not complete payment.

If the note is lost after suit commenced, from the files of the court, or the custody of the clerk or the attorney, after the proper search, evidence may be given of its contents, and the

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(*m*) Anderson *v.* Robson, 1 Brev. 263, *Brevard, J. dubitante.*

(*n*) Wade *v.* New Orleans Canal, &c. Co., 8 Rob. La. 140; Waters *v.* Bank of State of Georgia, &c., R. M. Charlt. 193; Robinson *v.* Bank of Darien, 18 Ga. 95, 111; Welton *v.* Adams, 4 Calif. 37. See Tower *v.* Appleton Bank, 3 Allen, 387.

(*o*) Dangerfield *v.* Wilby, 4 Esp. 159; Pierson *v.* Hutchinson, 2 Camp. 211; Kearslake *v.* Morgan, 5 T. R. 513; Burden *v.* Halton, 4 Bing. 454; Hadwen *v.* Mendisabal, 2 Car. & P. 20; Belshaw *v.* Bush, 11 C. B. 191; Price *v.* Price, 16 M. & W. 232; Crowe *v.* Clay, 9 Exch. 604; Pintard *v.* Tackington, 10 Johns. 104; Holmes *v.* D'Camp, 1 id. 34; Hughes *v.* Wheeler, 8 Cowen, 77; Raymond *v.* Merchant, 3 id. 147; McConnell *v.* Stettinius, 2 Gilman, 707; Miller *v.* Lumsden, 16 Ill. 161; Glenn *v.* Smith, 2 Gill & J. 493; Murray *v.* Carret, 3 Call, 373; Hays *v.* M'Clurg, 4 Watts, 452. On the sale of certain goods by the plaintiff, the defendant, the purchaser, agreed to accept bills for the price, and pay them when due. Afterwards, getting possession of one bill, indorsed to A, as trustee of the plaintiff's, he tortiously destroyed it. Held, in an action on the promise, that, since the agreement was to pay only the person entitled to receive payment at maturity, the plaintiff must amend and substitute the trustee's name for his own, or judgment must be for the defendant. Jungbluth *v.* Way, 1 H. & N. 71, 36 Eng. L. & Eq. 573.

plaintiff may recover, under the usual restrictions, as in other cases of lost notes.(*p*) And if the suit in such a case was begun at law, the loss cannot oust law of its jurisdiction.(*q*) Nor will the want of an amendment to the petition or declaration stating the loss, warrant the reversal of a judgment for the plaintiff.(*r*) It is not necessary, indeed, for him to offer indemnity against the future liability, before judgment; but the court will, if asked, restrain the *execution* till security is furnished.(*s*) Some of the cases may seem to indicate other distinctions between the loss of a note before action is commenced, and the loss afterwards. A loss afterwards is necessarily a loss after dishonor; but there is no other ground that we are aware of for any substantial distinction, unless it be where, in the pleadings, or otherwise in the course of the action, the defendant has admitted the existence and ownership of the note.

With regard to the pleadings on lost bills, something must be added to what we have already said incidentally. In this country, it is generally held, that no special count in the declaration upon a lost note is required.(*t*) In England, such a count seems

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(*p*) Poole *v.* Smith, Holt, N. P. 144; Brown *v.* Messiter, 3 Maule & S. 281; Allen *v.* Miller, 1 Dowl. 420; Clarke *v.* Quince, 3 id. 26; Flight *v.* Brown, 2 Tyrw. 312; Donelson *v.* Taylor, 8 Pick. 390; Enston *v.* Friday, 2 Rich. 427; Renner *v.* Bank of Columbia, 9 Wheat. 581; Viles *v.* Moulton, 11 Vt. 470; Vanauken *v.* Hornbeck, 2 Green, N. J. 178; Jones *v.* Fales, 5 Mass. 101; Abbott *v.* Striblen, 6 Iowa, 191; Jacks *v.* Darrin, 3 E. D. Smith, 548; Jacks *v.* Darrin, id. 557; Weston *v.* Hight, 17 Maine, 287. So of a lost bill of exchange obtained under a fiat in bankruptcy. Ex parte Trust, 3 Deac. & Ch. 750; Pooley *v.* Millard, 1 Cromp. & J. 411, 1 Tyrw. 331. Where a promissory note is lost after suit brought, the attorney for the plaintiff is a competent witness to prove its loss, and that a copy of the note annexed to the petition or declaration is a true copy; and after such proof, the copy of the note is admissible in evidence. Abbott *v.* Striblen, 6 Iowa, 191.

(*q*) Bliss *v.* Covington, 9 Dana, 265. So it is of a bond lost. Graves *v.* Wood, 3 B. Mon. 34. See also the cases in note *p*, *supra*.

(*r*) See note *t*.

(*s*) Bisbing *v.* Graham, 14 Penn. State, 14.

(*t*) Renner *v.* Bank of Columbia, 9 Wheat. 581; Vanauken *v.* Hornbeck, 2 Green, N. J. 178; Chaudron *v.* Hunt, 3 Stew. 31; Reynolds *v.* French, 8 Vt. 85; Edgell *v.* Stanford, 6 id. 551; Lazell *v.* Lazell, 12 id. 443; Viles *v.* Moulton, 11 id. 470, 13 id. 510; Hough *v.* Barton, 20 id. 455; Dormady *v.* State Bank of Illinois, 2 Scam. 236. No special count is required on a destroyed note. Hinsdale *v.* Bank of Orange, 6 Wend. 378. These cases proceed on the ground that no profert is requisite in this country in declaring upon a note lost, &c. *Contra*, Church *v.* Flowers, 2 Root, 144. "It is objected, lastly, that secondary evidence was not admissible, without a special count, in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, as far as our knowledge of it extends,

to be necessary. But in the practice there, according to Mr. Chitty,(*u*) "if the loss of the bill before action brought is not raised by plea in defence to the action, the plaintiff will recover, upon giving secondary evidence of the contents of the instrument." It is furthermore said, that if there be no traverse or other pleading which renders it necessary for the plaintiff to produce the bill on the trial, and he do not produce it, the only result will be, that he cannot obtain interest for the period before action, since the form of the declaration does not necessarily show when it became due.(*v*) The statute practice of the United States upon the pleading of lost notes is somewhat various.

If a negotiable note, made transferable by delivery, be lost by an indorser, who afterwards assigns his right in the note to another, the assignee must sue upon it in the name of the indorser, because, although assigned, it has not been indorsed. If assigned before it is lost, the action may be brought in the name of the assignee.(*w*) Any indorsee may maintain a suit against the maker or acceptor or indorser of the lost instrument,(*x*) and prior indorsees,(*y*) or the drawer,(*z*) need not be made parties thereto.

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and to require a special count upon a lost note would be shutting the door against secondary evidence in all cases where the note was lost after declaration filed. We do not *think* any danger of fraud is to be apprehended from the admission of such evidence under the usual count upon the note." *Thompson*, J., Renner *v.* Bank of Columbia, 9 Wheat. 581. In Mr. Justice Story's copy of this volume, now in the Harvard Law Library, after the printed note to the case above, namely, "Mr. Justice *Story* dissented," appears, in his handwriting, "but now assents to the opinion. May, 1834." Under an averment that the note is mislaid simply, the plaintiff, to recover, must produce the note. "The averment is in the alternative, that it has been lost *or* mislaid. By a mislaid note I understand one that is not found in its usual and proper place of deposit; and this has never been held sufficient to entitle the plaintiff to recover without producing it. A lost note is one which cannot be found after that thorough, careful, and vigilant search," etc. For the want of an averment of loss, the declaration was held bad, on error. Rogers *v.* Miller, 4 Scam. 333. The evidence of the note and of its loss is also good evidence under the money counts. Fitch *v.* Bogue, 19 Conn. 285; White *v.* Brown, id. 577.

(*u*) Chitty on Bills, 10th London ed., p. 184, citing Blackie *v.* Pidding, 6 C. B. 196, Charnley *v.* Grundy, 14 id. 608.

(*v*) Smith's Merc. Law, 5th ed., p. 283; Hutton *v.* Ward, 15 Q. B. 26. See on this point of the interest demandable, Fisher *v.* Mershon, 3 Bibb, 527.

(*w*) Smith *v.* Young, 2 Barb. 545; Leavitt *v.* Cowles, 2 McLean, 491 Smith *v.* Walker, 1 Smedes & M. Ch. 432; Willis *v.* Cresey, 17 Maine, 9.

(*x*) Davies *v.* Dodd, 4 Price, 176; West *v.* Patton, Litt. Sel. Cas. 405.

(*y*) Macartney *v.* Graham, 2 Sim. 285.

(*z*) Davies *v.* Dodd, 4 Price, 176, Wils. Exch. 110.

If the lost note be non-negotiable, as we have seen, secondary evidence may be given of its contents, and a special plea relying upon the loss would be no defence to the suit.(*a*) And even if the note be negotiable, if the defendant take issue upon a plea that he did not make the note declared on, and not upon the loss, the plaintiff could recover at law, even before the recent English statute.(*b*) And so if the defendant's plea is that the note was destroyed pursuant to an agreement, he cannot construct out of this an answer equivalent to pleading the loss, by rejecting the last clause, concerning the agreement.(*c*)

If an action be brought upon a lost note, and the defendant relies upon its negotiability, it would seem, on general principles, that this is a part of his case, which he must prove, the presumption of law being, for this purpose, that the note was not negotiable.(*d*) But the cases can hardly be considered as uniform on this point; and undoubtedly it is a presumption that would be easily removed, or, rather, not sustained except in the absence or equal balance of testimony.

By 9 and 10 Will. 3, c. 17, § 3, extended, probably, by 3 and 4 Anne, c. 9, to promissory notes, "in case any inland bill or bills shall happen to be lost or miscarried within the time limited for the payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill of the same tenor with those first given; the person or persons to whom they are delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills, so alleged to be lost or miscarried, shall be found again." This provision of the statute, however, was virtually a dead letter, because the common law courts were considered to have no means of enforcing of it. This statute has not been enforced or copied in this country, but it appears that provisions for duplicates are enforced on the continent of Europe. In the modern *Code de Commerce* of France, Art. 151, 152, this is distinctly provided for, as it was in the old *Ordonnance de la Marine* of Louis XIV., tit. 5, art. 19.(*e*)

(*a*) *Supra*, p. 289 note *i*, and p. 290, note *k*.

(*b*) Charnley *v.* Grundy, 14 C. B. 608, 25 Eng. L. & Eq. 318.

(*c*) Ibid.

(*d*) See the cases cited *supra*, p. 290, note *n*.

(*e*) Lord *Tenterden*, in Hansard *v.* Robinson, 7 B. & C. 90; see also 2 Pardes. 403

To guard against the inconveniences which may result from the loss of negotiable paper, it is very common in England, and not unfrequent in this country, to cut the notes or bills in halves, and send the halves by different conveyances, and at different times. The questions arising from this mode of transmission have been already somewhat considered by us. There has been, undoubtedly, a change in the law upon this subject. It was formerly decided in England, that if one of the halves of a bank-note so separated were lost or stolen, no action at law could be maintained by the owner on the other half. For, it was said, any *bona fide* purchaser of the lost half will get a perfect right to sue for the whole amount of the note, and accordingly the owner must sue his half in chancery, — unless the note be destroyed, — and offer the equitable indemnity against a subsequent action.(*f*) But this position was soon abandoned.(*g*) Whoever takes one half only of a note or bill, takes it certainly with a notice which lays upon him the necessity and responsibility of caution, and opens him to all equitable defences. Such seems to be, quite uniformly, the ruling of the American courts.(*h*)

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et seq. And on the English practice in reference to foreign bills in sets, consult Beawes, Bills, pl. 188; Marius, *passim*; Thomson, Bills, p. 327; Dehers *v.* Harriot, 1 Show. 163. When all the bills of a set miscarry, an action may lie for the original consideration. In one such case, the owners of the bill applied to the drawers for another bill of the same tenor and date, offering to indemnify them against the lost bills. The drawers refused to give a new copy, and were accordingly held liable in an action by the purchasers for money had and received. Murray *v.* Carret, 3 Call, 323. Where the second of a set of three bills was protested for non-acceptance, the defendant, an indorser, was held entitled to require its production, in an action on the first of the set, in order to guard against a subsequent claim by an acceptor *supra* protest. Wells *v.* Whitehead, 15 Wend. 527.

(*f*) Mayor *v.* Johnson, 3 Camp 324.

(*g*) "But the case of Mayor *v.* Johnson, 3 Camp. 324, is directly in point. In that case judgment was rendered for the defendant by Lord *Ellenborough*, on the ground that the last half of a bank-bill was negotiable, and would enable a *bona fide* holder to recover of the bank; which, with all due deference to an illustrious judge, I am bound to say is not law. As well might a vignette, or any other fragment torn from a bill be considered negotiable. The only apology I can make for his lordship is, that he was on the circuit, where business is done in haste, without time and means for investigation and consideration, and where the greatest judges frequently err. *Quandoque bonus dormitat Homerus.*" *Peters*, J., in Bank of United States *v.* Sill, 5 Conn. 106.

(*h*) Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; Martin *v.* Bank of United States, 4 id. 253; Armat *v.* Union Bank, 2 Cranch, C. C. 180; United States Bank *v.* Sill, 5 Conn. 106; Hinsdale *v.* Bank of Orange, 6 Wend. 378; Farmers' Bank *v.* Reynolds, 4 Rand. 186; Bank of Virginia *v.* Ward, 6 Munf. 166; Allen *v.* State Bank of N. C., 1 Dev. & B. Eq. 3; Patton *v.* State Bank, 2 Nott & McC. 464; State Bank

The owner, in these cases, does not recover in consequence of holding the half merely, but he must also satisfy the bank of the verity of the facts necessary to his case, that is, of the severance, the transmission by mail, and the loss, or else he must *establish* them by a judgment of court. And, furthermore, the half-notes sued on must be specifically and satisfactorily identified as the counterparts of the halves transmitted, or no recovery will be had.(*i*)

It has been frequently held, too, that giving a bond of indemnification to the bank is as much a pre-requisite to recovery as proving ownership of the half-note.(*j*) But from this conclusion, unless it be so directed by statute provision, we must dissent. For the payor will never be liable again, since the holder takes the missing half with notice of prior equities, and therefore no indemnity should be required.(*k*) The usage of any bank in

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of Ill. *v.* Aersten, 3 Scam. 135; Murdock *v.* Union Bank of La., 2 Rob. La. 112; Little *v.* Consolidated Association of Planters of La., 2 La. Ann. 1012; Union Bank *v.* Warren, 4 Sneed, 167; Commercial Bank *v.* Benedict, 18 B. Mon. 307; Northern Bank *v.* Farmers' Bank, id. 506; Streater *v.* Bank of Cape Fear, 2 Jones, Eq. 31. See note *g*.

(*i*) Bank of Virginia *v.* Ward, 6 Munf. 166.

(*j*) Farmers' Bank *v.* Reynolds, 4 Rand. 186; Allen *v.* State Bank, 1 Dev. & B. 3; Commercial Bank *v.* Benedict, 18 B. Mon. 307. Such cases as these follow Lord Ellenborough's rule (note *g*), to "require indemnity against any future holder who should set up the remaining half-note."

(*k*) Mossop *v.* Eadon, 16 Ves. Jr. 430. In this case, a bill in equity for payment of a promissory note which had been cut in two parts, one being produced and the other alleged to be lost, — an indemnity being offered, — was dismissed, because, on proving the loss, an action at law might be maintained. But an indemnity was thought proper. We think, however, that "payment by the bank to the *bona fide* holder of the other half of the note is all-sufficient for its protection, without any other indemnity." Union Bank *v.* Warren, 4 Sneed, 167. Indeed, since it is agreed that a severed note "is to be considered as a note destroyed," and that "the act of severance completely destroys its negotiability," (see cases in note *h*,) it would seem that such a note might be sued at law anywhere without an indemnity. Redmayne *v.* Burton, 9 C. B., N. S. This was an action by the plaintiffs against the defendants, bankers, to recover the amount of certain of their notes, the halves of which were lost in their transmission through the post. The plaintiffs pleaded the 27th and 28th Vict., ch. 125, § 87, and tendered indemnity. It was objected that the application was premature, being made before declaration; that the section did not apply to a case where only half the instrument was lost, and that the plaintiffs were not justified in cutting the notes in halves. *Miller*, J. said: "The law on this subject was much before the court upon a recent case, and the matter is therefore fully before my mind. The application is made at a proper time, and the section applies to this case. The Bank of England, acting upon what may be called the law merchant, has always been in the habit of paying on an indemnity.

paying to any holder of half a note half and only half its amount, is not sanctioned by law, and cannot be sustained.(*l*) In like manner, the bank cannot give notice that it will not pay anything on a half-note, and then refuse to pay on the ground of this notice. It cannot prescribe such terms to its creditors.(*m*)

Lord Tenterden considered the practice of cutting notes into halves, in order to send the pieces by different conveyances, to be a reasonable precaution.(*n*) And certainly it would be unwise, as well as unjust, to put the party taking such precautions on the ground of one who wilfully destroys his note, since, though the act of severing be voluntary, the intent is to preserve; and the rights of the owner are unaffected by that act.(*o*) But if a bank-note be mutilated in a material part, for the fraudulent purpose of imposing it upon the public, and defrauding the bank from which it issued, it is of course no longer binding upon the bank.(*p*)

If one party sends a note or bill to another, and it is lost on the way, the question may arise, On whom does the loss fall? The answer, generally at least, would be this. If it were sent by the constituted agent for the party who was to receive it, or by some person, or by some means of conveyance, specially authorized by the party to whom it was sent, or even by any person

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My opinion is, that the defendants would be liable to pay without an indemnity, as any person taking a half-note would take it with notice; but the plaintiffs having offered an indemnity, let it be so. I shall make an order as asked, and if the defendants within a week elect to pay, then the plaintiffs shall give the indemnity, give up the half-notes to the defendants, and pay them the costs of the action, and thereupon all further proceedings shall be stayed. The practice of cutting a negotiable instrument in half was recognized in a late case, where a person gave another a bill to get discounted, who, not having succeeded, returned it to the acceptor, and he tore it in half and threw it on the ground; the two halves were picked up, and got into the hands of a *bona fide* holder for value, who recovered."

(*l*) Allen *v.* State Bank, 1 Dev. & B. Eq. 3; Patton *v.* Bank of So. Car., 2 Nott & McC. 464; Martin *v.* Bank of U. S., 4 Wash. C. C. 253.

(*m*) U. S. Bank *v.* Sill, 5 Conn. 106.

(*n*) Williams *v.* Smith, 2 B. & Ald. 496. So see Commercial Bank *v.* Benedict, 18 B. Mon. 307.

(*o*) Allen *v.* State Bank, 1 Dev. & B. Eq. 3; U. S. Bank *v.* Sill, 5 Conn. 106; Northern Bank *v.* Farmers' Bank, 18 B. Mon. 506; Maberly *v.* Bank of Scotland, 1 Shaw & B. Sess. Cas. 338, on appeal, in 1 Wilson & S. 10, cited in Thomson on Bills, p. 322. The same rule applies to the case of notes and bills mutilated by accident, or without intent to injure. Miner *v.* Bank of La., 1 Mart. La. 12; Dean *v* Speakman, 7 Blackf. 317; Myers *v.* Sealy, 5 Rich. 473.

(*p*) Northern Bank *v.* Farmers' Bank, 18 B. Mon. 506.

or means of conveyance which that party had specially pointed out and approved, the loss would fall on him who should have received it. Otherwise, as the property in the note remains in him who sends it until received, if lost on the way and therefore never received, it is the loss of him who sent it.(*q*)

If a note or bill be stolen or lost from the post-office, or from mail-bags, the postmaster-general certainly is not responsible therefor,(*r*) unless it could be shown that he had tortiously or negligently employed an agent whom he had good reason for believing incompetent or dishonest, and whose incompetency or dishonesty caused the loss. But any deputy or employee, to whose negligence or fraud the loss is traceable, may be held responsible; (*s*) and perhaps a liability of this kind might attach in

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(*q*) Warwicke *v.* Noakes, Peake, 67; Cuming *v.* Marshall, Thomson on Bills, p. 318, note 4.

(*r*) Lane *v.* Cotton, 1 Ld. Raym. 646, 5 Mod. 456, 1 Salk. 17, 1 Comyns, 100, Carth. 487, Holt, 582, 11 Mod. 12, and more at large in 12 Mod. 472; Whitfield *v* Le Despencer, 2 Cowp. 724. Farries *v.* Elder, Thomson on Bills, 318, note 2.

(*s*) Lane *v* Cotton, *supra*, note *r*; Rowning *v.* Goodchild, 3 Wils. 443, 2 W. Bl. 906, 5 Burr. 2716; Barnes *v.* Foley, 5 Burr. 2711; Stock *v.* Harris, id. 2709; Bolan *v.* Williamson, 1 Brevard, 181, 2 Bay, 551; Dunlop *v.* Munroe, 7 Cranch, 242; Schroyer *v.* Lynch, 8 Watts, 453; Maxwell *v.* M'Ilvoy, 2 Bibb, 211; Bishop *v.* Williamson, 2 Fairf. 495; Franklin *v.* Low, 1 Johns. 396; Teall *v.* Felton, 3 Barb. 512, 1 Comst. 537, in error. In this country, the postmaster-general appoints his own deputies, and derives certain emoluments from his business, above his salary. In England, however, the sworn deputies are appointed by the Crown, and the postmaster-general has a fixed salary only. These and other distinctions caused some discrepancy between the English and some of the earlier American cases. In Bolan *v.* Williamson, "The court were of opinion that the postmaster is liable for a loss occasioned by negligence in his office; but that his deputy, or assistant, is not responsible to the party injured, although the loss is occasioned solely by his default, unless he is an officer of the department recognized by law; and if he is such an officer, he alone is responsible, and not the postmaster." In Schroyer *v.* Lynch, it was decided that a postmaster, though answerable for want of attention to the official conduct of his subordinates, is not responsible for their secret delinquencies, as for the purloining of a letter by a sworn assistant, appointed and retained by him in good faith. *Gibson*, C. J. said of Lord *Holt's* judgment in Lane *v.* Cotton: "That so sharp an eye had not perceived a difference betwixt a postmaster's official assistant and his private servant, is attributable to the novelty of the post-office establishment at the time." In Bishop *v.* Williamson, it was held that the postmaster of a town is liable for the acts of one whom he permitted to have the care and custody of the mail, in his office, not having been sworn according to law. So in Dunlop *v.* Munroe, p. 269, under an allegation of negligence by a postmaster, evidence was not admitted of negligence of his sworn assistant, because "the distinction between the relation of a postmaster to his sworn assistant acting under him, and between master and servant generally, has long been settled, ... and his liability will only result from his own neglect in not properly superintending the discharge of his assistant's duties in his office."

some instances to a deputy postmaster for the fault of his servants. But negligence of the plaintiff co-operating with the postmaster's to produce the damage, will bar his recovery, in any case.(*t*)

In England, the liability of common carriers for the loss of bills and notes exceeding ten pounds is now regulated by the 1 Wm. 4, c. 68, § 1.(*u*)

(*t*) Hordern *v.* Dalton, 1 Car. & P. 181; Hawkins *v.* Rutt, Peake, 186; Bishop *v.* Williamson, 2 Fairf. 495.

(*u*) For a case under this statute, &c., see Stoessiger *v.* South Eastern Railway Co., 3 Ellis & B. 549.

CHAPTER X.

OF THE LAW OF PLACE.

Under this title we propose to consider the effect upon the rights, obligations, or remedies of parties to or holders of negotiable paper, of the circumstance that the instrument was made, or is payable in one place, and is litigated or to be executed in another, and the law of the one place differs from that of the other. A question arising in this way may be determined by the law of the place where the contract is made, by that of the place where the contract is to be executed, by that of the place where the trial is had, or by that of the domicil of a party; or, to use the Latin phrases, which are still frequently employed, by the *lex loci contractus*, the *lex loci solutionis*, the *lex fori*, or the *lex domicilii*. The rules and principles which decide these questions are regarded as of great importance in Europe, and have been much considered there. Here, as we shall see, they are of far greater importance and difficulty. We shall confine our remarks to the application of the law of place to negotiable paper, considering the general principles of this subject only so far as may be necessary for understanding this specific application of them.

SECTION I.

OF THE GENERAL PRINCIPLES OF THE LAW OF PLACE.

The law of place in relation to simple contracts generally, rests upon the obvious principle, that they are to be construed and governed by the law of the place where they are made and to be performed. Hence all formalities necessary to the validity of a contract must conform to the law of the place where it is made. If valid where they are made and to be performed, they

are *jure gentium* valid everywhere.(*a*) And if illegal or invalid by the law of the place of the contract, they will be so everywhere; unless this invalidity is caused by revenue laws, for these are not regarded by foreign courts.(*b*) Nor will any court enforce penalties arising under a foreign law; (*c*) nor will the laws of forfeiture in one's own country be allowed by the courts of another country to operate upon his rights there.(*d*) It is indeed true, that the law of the place where a contract is made enters into and makes part of the contract, and its obligation,

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(*a*) Casaregis, Disc. 179, §§ 1, 2; Chartres *v.* Cairnes, 16 Mart. La. 1; Willings *v.* Consequa, Pet. C. C. 172; Watson *v.* Orr, 3 Dev. 161; 2 Kent, Com., pp. 457, 458; De Sobry *v.* De Laistre, 2 Harris & J. 191, 221, 228; Smith *v.* Mead, 3 Conn. 253; Medbury *v.* Hopkins, id. 472; Houghton *v.* Page, 2 N. H. 42; Dyer *v.* Hunt, 5 id. 401; Andrews *v.* Herriot, 4 Cowen, 510, note *a;* Trimbey *v.* Vignier, 1 Bing. N. C. 151, 159, 4 Moore & S. 695; Andrews *v.* Pond, 13 Pet. 65; Andrews *v.* Creditors, 11 La. 464; Whiston *v.* Stodder, 8 Mart. La. 95; Bank of United States *v.* Donnally, 8 Pet. 361, 372; Wilcox *v.* Hunt, 13 id. 378; Harper *v.* Hampton, 1 Harris & J. 453, 622, 662; Palmer *v.* Yarrington, 1 Ohio State, 253; Brackett *v.* Norton, 4 Conn. 517; Warrender *v.* Warrender, 9 Bligh, 110; Courtois *v.* Carpentier, 1 Wash. C. C. 376.

(*b*) Huberus, Lib. I. tit. 3; De Confl. Leg., §§ 3, 5, and cases *supra;* Van Reimsdyk *v.* Kane, 1 Gallis. 371; Pearsall *v.* Dwight, 2 Mass. 84; Touro *v.* Cassin, 1 Nott & McC. 173; McAllister *v.* Smith, 17 Ill. 328; Kanaga *v.* Taylor, 7 Ohio State, 134; Van Schaick *v.* Edwards, 2 Johns. Cas. 355, in which case the note was usurious in Massachusetts, and was held void in New York; Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Camp. 166; U. S. *v.* La Jeune Eugenie, 2 Mason, 459; Cod. Lib. I. tit. 14, l 5. In Robinson *v.* Bland, 2 Burr. 1077, cited *supra*, Bland, in France, drew a bill on himself, payable in England, for a gaming debt. Lord *Mansfield* said: "The parties had a view to the laws of England," and the bill was held void as against the English statute against gambling. But it was said that the bill could not have been enforced in France either, which seems very material, for the legality of consideration seems most properly determined by the law of the place where it passed, rather than where the contract was to be executed. Phillips & Sewall's note to Bailey on Bills, 79 (Am. ed. 1838).

(*c*) McAllister *v.* Smith, 17 Ill. 328.

(*d*) Folliott *v* Ogden, 1 H. Bl. 123; Scoville *v.* Canfield, 14 Johns. 338; Warder *v.* Arell, 2 Wash. Va. 295, per *Roane*, J.; Commonwealth *v.* Green, 17 Mass. 515; West Cambridge *v.* Lexington, 1 Pick. 506. See Camp *v.* Lockwood, 1 Dall. 393; David *v.* Porter, 4 Harris & McH. 418; Cox *v.* U. S., 6 Pet. 172; Carnegie *v.* Morrison, 2 Met. 381, 397; Bulger *v.* Roche, 11 Pick. 36; Brackett *v.* Norton, 4 Conn. 517; Sherrill *v.* Hopkins, 1 Cowen, 103; Allen *v.* Watson, 2 Hill, S. Car. 319; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Watson *v.* Brewster, 1 Barr, 381; Watson *v.* Orr, 3 Dev. 161; Martin *v.* Martin, 1 Smedes & M. 176; Roe *v.* Jerome, 18 Conn. 138; Vidal *v.* Thompson, 11 Mart. La 23; Warrender *v.* Warrender, 9 Bligh, 89, 111; Wynne *v.* Jackson, 2 Russ. 351; Boullenois, Quæst. Mixt., p. 5, and all the civil-law writers; Depau *v.* Humphreys, 20 Mart. La. 1, 22; Clegg *v.* Levy, 3 Camp. 166; James *v* Catherwood, 3 Dowl & R. 190. As an example of this, if a protest be made

nature, and validity should be judged thereby.(*e*) Hence, the law of the place where a contract is made, or to be performed, continues to control its construction, and not the law of the place to which either or all the parties remove; because, as it is said, what is not an obligation in one place cannot be made so by any change in the place of the parties.(*f*) But where all the facts of a case transpire in a foreign State, the law of such State is to be applied to ascertain the rights of the parties.(*g*) And it is generally true that if a contract is made in a par-

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on a bill of exchange in a State where the law requires such protest to be under seal, a protest not so authenticated will not have any force as evidence of dishonor in another State. Tickner *v.* Roberts, 11 La. 14; Bank of Rochester *v.* Gray, 2 Hill, 227; Le Parfait Négociant, Tom. I. p. 3, Liv. I. ch. 14, p. 851. See Wynne *v.* Jackson, 2 Russ. 351. *Sed quære* per Chitty, 8th ed., note *x*, p. 170.

(*e*) Pearsall *v.* Dwight, 2 Mass. 84, per *Parsons*, C. J.; Sherrill *v.* Hopkins, 1 Cowen, 103. The laws of a place where a legal contract is made are to govern, except where the parties at the time had a view to a different State or country. Robinson *v.* Bland, per *Mansfield*, C. J., 1 W. Bl. 258, 2 Burr. 1077; Holman *v.* Johnson, 1 Cowp. 341; Mostyn *v.* Fabrigas, id. 161; Smith *v.* Buchanan, 1 East, 6; Inglis *v.* Usherwood, id. 515; Melan *v.* Fitzjames, 1 Bos. & P. 138; Chapman *v.* Robertson, 6 Paige, 627; Johnson *v.* Smith, 2 Burr. 950; Sherrill *v.* Hopkins, 1 Cowen, 103; Martin *v.* Hill, 12 Barb. 631. In Melan *v.* Fitzjames, Mr. Justice *Heath* stated the true distinction, that in construing contracts the law of the place where they are made must govern, but that the remedy upon them must be pursued by such means as the laws point out where the parties reside. This is approved by Lord *Tenterden*, C. J., in De La Vega *v.* Vianna, 1 B. & Ad. 284. At least, the *lex loci contractus* is to govern as to the nature and construction as well as the validity of a contract. Ranelaugh *v.* Champante, 2 Vern. 395; Ranelaugh *v.* Champant, Eq. Cas. Abr., 289, Interest Money, E; Lewis *v.* Fullerton, 1 Rand. 15; Van Reimsdyk *v.* Kane, 1 Gallis. 371; Le Roy *v.* Crowninshield, 2 Mason, 151; Pomeroy *v.* Ainsworth, 22 Barb. 118; Hodges *v.* Shuler, 24 Barb. 68; Chapman *v.* Robertson, 6 Paige, 627; Smith *v.* Smith, 2 Johns. 223; Delvalle *v.* Plomer, 3 Camp. 47; Harrison *v.* Sterry, 5 Cranch, 289; Mackie *v.* Cairns, 5 Cowen, 578; Barrell *v.* Benjamin, 15 Mass. 354; Watson *v.* Bourne, 10 id. 337; Ferguson *v.* Flower, 16 Mart. La. 312; Prentiss *v.* Savage, 13 Mass. 20; Medway *v.* Needham, 18 id. 157; West Cambridge *v.* Lexington, 1 Pick. 506; Winthrop *v.* Carleton, 12 Mass. 4.

(*f*) Burrows *v.* Jemino, Str. 733, Sel. Cas., Macn. ed. 192; Potter *v.* Brown, 5 East, 124; Argument in Wynne *v.* Callandar, 1 Russ. 293; Melan *v.* Fitzjames, 1 Bos. & P. 138; Talleyrand *v.* Boulanger, 3 Ves. 447; Glenar *v.* Meyer, 2 H. Bl. 603; Mostyn *v.* Fabrigas, 1 Cowp. 161; Alves *v.* Hodgson, 7 T. R. 241; Du Costa *v.* Cole, Skin. 272; Johnson *v.* Machielsne, 3 Camp. 44; Shelton *v.* Marshall, 16 Texas, 344.

(*g*) Sallee *v.* Chandler, 26 Misso. 124. Therefore the place of payment determines what law shall regulate a promissory note. But it is held, upon the ground that the *lex loci* governs the construction and validity of contracts, that the performance and subject-matter of a contract, being in a foreign state, can give no validity to a contract void under the Statute of Frauds. Dacosta *v.* Hatch, 4 N. J. 319.

ticular place, and performable generally, that is, if no particular place of performance is mentioned, it is to be presumed that it is to be there performed.(*h*) This seems to be just, and obviously the intention of the parties.

If, however, the parties intend to be governed by the law of a place other than that where the contract is made, this enters into and forms a part of their contract. Therefore, when the contract is to be performed in another place, and this appears from the express terms of the contract, the law of the place of performance is allowed to govern, for it is plain that the parties would naturally have in view the laws of the place where their contract is to be performed, and probably be enforced.(*i*)

While it seems to be a universal rule that a personal contract made in any place, and valid and legal there, is valid and legal everywhere, and enforceable against the party whom it binds, wherever he may be, an exception is made where the foreign law manifestly tends to the injury of our own citizens, in which case the comity of nations would not be extended so far as to give it force, or where it violates the law of nations, or common decency or morality,(*k*) and then, as these may be con-

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(*h*) In Young *v.* Harris, 14 B. Mon. 556, and in Pomeroy *v.* Ainsworth, 22 Barb. 118, where a part of the contract was to be performed in one country and a part in another, each part was held to be governed by the law of the place where it was performable. This rule was applied with regard to the payment of interest.

(*i*) Smith *v.* Mead, 3 Conn. 253; Thompson *v.* Ketcham, 4 Johns. 285, 8 id. 189; Warren *v.* Lynch, 5 id. 239; Pope *v.* Nickerson, 3 Story, 465; Goddin *v.* Shipley, 7 B. Mon. 575; Broadhead *v.* Noyes, 9 Misso. 55; Dorsey *v.* Hardesty, id. 157; Sherman *v.* Gassett, 4 Gilman, 521; Tyler *v.* Trabue, 8 B. Mon. 306; Don *v.* Lippmann, 5 Clark & F. 1, 13, 19; Andrews *v.* Pond, 13 Pet. 65; Kanaga *v.* Taylor, 7 Ohio State, 134. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.* Dig. Lib. 44, tit. 7, 21; Lib. 42, tit. 5, l. 3.

(*k*) "Neither the State in whose court the contract is put in suit nor its citizens may suffer any inconvenience by giving the contract effect," per *Parsons*, C. J., Pearsall *v.* Dwight, 2 Mass. 89; Le Roy *v.* Crowninshield, 2 Mason, 151; Ohio Ins. Co. *v.* Edmondson, 5 La. 295; Van Reimsdyk *v.* Kane, 1 Gallis. 371; Whiston *v.* Stodder, 8 Mart. La. 95; Brown *v.* Richardson, 13 id. 202; De Sobry *v.* De Laistre, 2 Harris & J. 193, 228; Lodge *v.* Phelps, 1 Johns. Cas. 139; Trasher *v.* Everhart, 3 Gill & J. 234; Saul *v.* Creditors, 17 Mart. La. 569; Andrews *v.* Pond, 13 Pet. 65. Mahorner *v.* Hooe, 9 Smedes & M. 247, held that, as the emancipation of slaves by will was forbidden in Mississippi, they were not emancipated by a will made in Virginia, though allowed there. In Robinson *v.* Bland, 2 Burr. 1077, Mr Justice *Wilmot* said: "The *law of the place* where the thing happens does not *always* prevail. In many countries a contract may be maintained by a courtesan for the price of the prostitution; and one may suppose an action to be brought here upon such a contract which arose in such a coun

sidered in force everywhere, it may be indeed said that such a contract cannot be regarded as legal and valid where it was made. This is upon the principle that no one should be heard in alleging his own moral turpitude or fraud. *Nemo allegans suam turpitudinem audiendus est.* This broad principle has been advocated by high authorities.(*l*)

We have already stated that the revenue laws of foreign countries are only regarded in the courts of the country which has enacted them.(*m*) But this seems to be censured as a mere subserviency to the interests of commerce.(*n*) And, in respect to this rule, it is remarked by Emerigon, that smuggling is a vice common to all nations.(*o*)

It must be constantly borne in mind, that no laws have an ex-territorial force of their own, except as they are allowed *ex comitate*.(*p*)

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try. But that would never be allowed in *this* country." Pearsall *v.* Dwight, 2 Mass. 84, per *Parsons*, C. J. In Greenwood *v.* Curtis, 6 Mass. 358, the court held that a contract made in a foreign place, and to be there executed, if valid there, may be enforced in Massachusetts, although not valid by the laws of Massachusetts, or prohibited to her citizens, except the Commonwealth or its citizens may be injured by giving the contract a legal effect here, or the enforcing it in our courts would exhibit to the citizens of the State a pernicious and detestable example.

(*l*) Armstrong *v.* Toler, 11 Wheat. 258; Boucher *v.* Lawson, Cas. Temp. Hardw, Lond. ed. 85, 89, 194; Planche *v.* Fletcher, 1 Doug. 251.

(*m*) Lightfoot *v.* Tenant, 1 B. & P. 551; Planche *v.* Fletcher, 1 Doug. 251; Boucher *v* Lawson, Cas. Temp. Hardw., Lond ed. 85, 89, 194; Holman *v.* Johnson, 1 Cowp. 341; Biggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 id. 466; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Wynne *v.* Jackson, 2 Russ. 351; James *v.* Catherwood, 3 Dowl. & R. 190, per *Abbott*, C. J.; 5 Pardes., art. 1492; Lever *v.* Fletcher, 1 Marsh, Ins. 58. But see Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Camp. 166. In Wynne *v.* Jackson, 2 Russ. 351, so far was this doctrine carried, that a holder was allowed to recover on a French bill with a French stamp, though, in consequence of its not being in the form required in the French Code, the plaintiff had failed to maintain an action in a French court.

(*n*) Story, Confl. Laws, §§ 256, 257; Pothier, Assur., note 58. See *contra*, Pardes., art. 1492; 2 Valin, Comm., art. 49, p. 127; and 1 Emerigon, ch. 8, § 8, pp. 212, 215. But Mr. Chitty, on Commerce and Man., pp. 83, 84, and Mr. Marshall, agree with Pothier, 1 Mar. Ins. 59–61, 2d ed. So Mr. Chancellor Kent, 3 Com. § 48, pp. 266, 267, 3d ed. See United States *v.* La Jeune Eugenie, 2 Mason, 409, 461.

(*o*) Emerigon where cited in the preceding note.

(*p*) Blanchard *v.* Russell, 13 Mass. 1; Bulger *v.* Roche, 11 Pick. 36; Carnegie *v.* Morrison, 2 Met. 381.

SECTION II.

OF THE APPLICATION OF THE LAW OF PLACE TO THE UNITED STATES.

THE reason why the principles of the law of place have a frequency of application in this country, and an importance not attaching to them in most countries, is to be found in the fact that our numerous States are, for certain purposes, though not for other purposes, foreign to each other.(*q*) It would not be pretended that at the present time the colonies of Nova Scotia and Jamaica are not (considered in reference to the law of place) foreign to each other, although both belong to Great Britain. In the same way, the various States of the Union were separate colonies before the Revolution, and, as far as their mercantile laws were concerned, entirely independent of and foreign to each other. The Revolution which separated them from the mother country made them united in interest and feeling, but we must look to the provisions and spirit of the Articles of the Confederation and the Constitution of the United States to determine how far they have been rendered one and the same country.

In the first place, it is to be observed that every single State preserves all the machinery of a government perfect in itself; that it has a complete system of judicature, and distinct and various laws; that in some States the civil law may obtain, while in others the common law has been brought by the immigrants

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(*q*) In Warder *v.* Arell, 2 Wash. Va. 298, the President of the Court of Appeals for Virginia said, after stating that in cases of contracts the law of a foreign country where a contract was made must govern: "The same principle applies, though with no greater force, to the different States of America; for, though they form a confederated government, yet the several States retain their individual sovereignties, and with respect to their municipal laws are to each other foreign." Buckner *v.* Finley, 2 Pet. 586. "In none of these laws (of the States), however," says Mr. Justice *Washington*, "so far as we can discover from Griffith's Law Register, to which we were referred by counsel, except those of Virginia, are bills drawn in one State upon another designated as inland." Duncan *v.* Course, 3 Const. R. 100. In Sturges *v.* Crowninshield, 4 Wheat. 122, 192, *Marshall*, C. J., said: "In considering this question, it must be recollected that, previous to the formation of the new constitution, we were divided into independent States, united for some purposes, but in most respects sovereign. These States could exercise almost every legislative power, and among others that of passing bankrupt laws." In Andrews *v.* Herriot, 4 Cowen, 510, the note contains the following language: "That the attention of our courts should often be drawn

from England, and preserved entire. There can be no doubt that before the purchase of Louisiana by the United States from France, it was as foreign to the rest of the States as France herself.

By the Articles of Confederation certain legislative, judicial, and executive powers were surrendered by the several States to the general government, which they constituted in their collective capacity. The Constitution made the union more perfect, and remedied the defects of the previous instrument. By it certain rights are secured to the citizens of the several States in the other States. The comity of nations is made more perfect and more definite with regard to judgments obtained in sister States, and provision is made for the surrender of certain powers as before mentioned..

But the United States are for many purposes one and the same State. Our Union was "intended to make us, in a great measure, one people, as to commercial objects; so far as respects the intercommunication of individuals, the lines of separation between States are in many respects obliterated."(*r*) Thus, it has been much questioned whether, in relation to the distinction between foreign and domestic factors, our States are foreign or not, — for the presumption of law is that credit is given absolutely to the foreign factor, but to the principal of the domestic factor, — and the prevailing and better rule is that they are not.(*s*)

But with regard to promissory notes and bills of exchange, it

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to them results from the political confederacy of the States, which, while it supports among them close and extensive connections in business and policy, yet holds them sufficiently distinct and independent to call into continual exercise that rule which expounds and gives effect to contracts and other transactions according to the State law under which they are made or take place; but stops there, and carefully distinguishes between construction and right on the one hand, and remedy on the other." Miller *v.* Hackley, 5 Johns. 375. *Van Ness*, J. said that bills drawn in New York on Charleston, South Carolina, were inland bills; but this is said by Mr. Chancellor Kent, in his Commentaries, Vol. 3, p. 63, note, not to have been necessary to determine the case, and to have been the opinion of Van Ness alone. This view is censured in Buckner *v.* Finley, 2 Pet. 586. See Tucker's note, 2 Bl. Com. 467. Judgments of other States are regarded as foreign. Hitchcock *v.* Aicken, 1 Caines, 460; Bartlett *v.* Knight, 1 Mass. 401. The States are foreign to each other so far as the Statute of Limitations is concerned. Whitney *v.* Goddard, 20 Pick. 304.

(*r*) Ogden *v.* Saunders, 12 Wheat. 213, 334, per *Marshall*, C. J.

(*s*) See 1 Parsons on Contracts, 82, note *n*.

seems, after some conflict, to be settled that the States are foreign.(*t*)

SECTION III.

OF THE GENERAL RULES OF THE LAW OF PLACE IN ITS APPLICATION TO BILLS AND NOTES.

NEGOTIABLE notes and bills are peculiar instruments, which in this respect, as in most others, must be governed by their own laws.

These, we think, rest upon five principles:—

First, that if a bill or note be payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written, or signed, or dated.(*u*)

(*t*) A bill of exchange drawn by a person residing in one of the United States upon a person residing in another is a foreign bill with regard to protest, certainly. This was so held by *Shaw*, C. J., in Phœnix Bank *v.* Hussey, 12 Pick. 483, citing Buckner *v.* Finley, 2 Pet. 586. This latter case decides that a bill of exchange drawn in one State upon a person in another State, and payable in the latter, is a foreign bill within the meaning of the 11th section of the judiciary act, 1 U. S. Statutes at Large, 78, and if its holder be competent to sue in the Circuit Court, it is of no importance that the original payee was not so competent. In the following cases the several States have been held as foreign with regard to bills and notes. Miller *v.* Hackley, 5 Johns. 375; Duncan *v.* Course, 3 Const. R. 100; Lonsdale *v.* Brown, 4 Wash. C. C. 86, id. 148; Wells *v.* Whitehead, 15 Wend. 527; Halliday *v.* McDougall, 22 Wend. 264; Warren *v.* Coombs, 20 Maine, 139. Bills drawn in England payable in Ireland or Scotland, or *vice versa*, are foreign bills, for they were so before the union, and the union does not make them inland bills. Mahoney *v.* Ashlin, 2 B. & Ad. 478; King *v.* Walker, 1 W. Bl. 286. The same reasoning we think applicable to those bills which are drawn by one State upon another. A bill drawn in Jamaica on Nova Scotia would not be an inland bill. Before the revolution, a bill drawn in Massachusetts on New York must have been considered as a foreign bill. The union certainly does not make such bills inland, and we see no clause in the Constitution, or principle in its spirit, which would authorize Congress to declare such bills inland.

(*u*) "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance." Per *Taney*, C. J., in Andrews *v.* Pond, 13 Pet. 77. As far as a note is concerned, the contract of which it is the evidence is to be performed where payment thereof is to be made. Champant *v.* Ranelagh, Finch. Prec. in Ch. 128; Huberus de Conf. L. 233, 234; Voet ad Pand. 4, 1, 29; Robinson *v.* Bland, 2 Burr. 1077; Dig. 42, 5, id. 44, 7, 21; Strother *v.* Lucas, 12 Pet. 436, 412, per *Baldwin*, J.; Bell *v.* Bruen, 1 How. 182; Le Breton *v.* Miles, 8 Paige, 261. Thus the days of grace to be allowed on bills of exchange are to be computed according to usage in the place where they are to be paid, and not of the place where drawn. Vidal *v.* Thompson, 11 Mart. La. 23; Bank of Washington *v.* Triplett, 1 Pet. 25. *Marshall*, C. J. said: "The usage (days

Secondly, that if by the express terms of a note or bill, or by legal construction of its terms, it is payable specially in any place, it is presumed that both parties knew this fact.(*v*)

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of grace) by which questions of this sort are governed is different in different places. It varies from three to thirty days, and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington." The custom was in Washington to make demand on the fourth day of grace instead of the third, and it has been held to make no difference whether the usage is known to the parties or not. Renner *v.* Bank of Columbia, 9 Wheat. 581; Mills *v.* Bank of United States, 11 Wheat. 431. In Thompson *v.* Ketcham, 4 Johns. 285, a note was made in Jamaica, payable in New York, and it was held by the Supreme Court to be governed by New York law. Smith *v.* Smith, 2 Johns. 235; Emory *v.* Greenough, 3 Dallas, 369; Van Schaick *v.* Edwards, 2 Johns. Cas. 355. The place on which the note was drawn was held to determine the interest for which the drawee was liable in Boyce *v.* Edwards, 4 Pet. 111. In this case the bills were drawn in Georgia, payable in South Carolina. Cooper *v.* Waldegrave, 2 Beav. 282. Protest must be made according to the law of the place where it is made. Trimbey *v.* Vignier, 1 Bing. N. C. 151. In this case, a French advocate, called as a witness by the defendants, testified that by the law of France a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested. Carter *v.* Burley, 9 N. H. 558; Brabston *v.* Gibson, 9 How. 263; Shanklin *v.* Cooper, 8 Blackf 41; Rothschild *v.* Currie, 1 Q. B. 43.

(*v*) In Baker *v.* Wheaton, 5 Mass. 509, a discharge was obtained in Rhode Island, of which State both promisor and promisee were citizens at the time of making the note. The only point decided was that the discharge would avail against the indorsee as well as the promisee, because the note was dishonored at the time of its indorsement and before, per *Parsons*, C. J. In Blanchard *v.* Russell, 13 Mass. 16, the debtor party to the contract was an inhabitant of the State where the contract was made. See also Van Raugh *v.* Van Arsdaln, 3 Caines, 154, where a discharge under the insolvent laws of Pennsylvania was held no bar to a suit brought by an indorsee against the indorser of a promissory note, the indorsement having been made in the State where the action is brought, and the indorsee being an inhabitant of the same, and the indorser and defendant being an inhabitant of Pennsylvania. See Sherrill *v.* Hopkins, 1 Cowen, 103. In Braynard *v.* Marshall, 8 Pick. 194, it was held that a discharge under the insolvent laws of one of the United States was no bar to an action brought by a citizen of another State upon a contract made between them in the State where the insolvent law was passed. The note in that case was passed by a citizen of New York, in New York, to one intending to become a citizen of that State, and was then indorsed to an inhabitant of Massachusetts. Donnelly *v.* Corbett, 3 Seld. 500; Scribner *v.* Fisher, 2 Gray, 43. "It is difficult," says Mr. Justice *Story*, "to perceive the ground upon which this doctrine can be maintained as a doctrine of public law." Bills, §§ 167, 158; Confl. of Laws, §§ 340, 344. It does not appear to us that an attempt is made to establish this as a doctrine of public law; but as a rule derived from Ogden *v.* Saunders, 12 Wheat. 213, under the Constitution of the United States, in which case Mr. Justice Story was one of the judges upon the bench of the Supreme Court of the United States. But Mr *Story* says that the case distinctly overrules Blanchard *v.* Russell, 13 Mass. 1. Mr. Justice *Parker*, of Massachusetts, delivering the opinion in Braynard *v.* Marshall,

Thirdly, it is presumed that both parties knew the law of the place in which the paper is payable.(*w*)

Fourthly, that both parties intend that this law shall govern the contract.(*x*)

Fifthly, that while this law governs the contract as to all the rights and obligations resting upon it, the law of the place in which such a note or bill is sued (the *lex fori*) governs the remedies upon the note or bill.(*y*)

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says that it does not. It appears, however, that the court in Ory *v.* Winter, 16 Mart. La. 277, decided differently from the court in Massachusetts. See Slacum *v.* Pomery, 6 Cranch, 221; De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385. The rule, with regard to discharge under the insolvent laws of one of the United States, seems to be that a discharge under a State insolvent law is not valid, unless both parties are inhabitants of, or individually in, the State at the time when the contract was made. Harris *v.* Mandeville, 2 Dall. 256; Proctor *v.* Moore, 1 Mass. 198; Smith *v.* Smith, 2 Johns. 235. But see Hicks *v.* Brown, 12 Johns. 142; Barber *v.* Minturn, 1 Day, 136. In Woodhull *v.* Wagner, Bald. C. C. 296, the decisions of the Supreme Court of the United States on the subject of insolvency are well collected. Boyle *v.* Zacharie, 6 Pet. 348, 642; Van Hook *v.* Whitlock, 26 Wend. 43; Gardner *v.* Lee's Bank, 11 Barb. 558.

(*w*) Tappan *v.* Poor, 15 Mass. 419; Le Chevalier *v.* Lynch, Doug. 170. See Hunter *v.* Potts, 4 T. R. 182; Phillips *v.* Hunter, 2 H. Bl. 402.

(*x*) Mason *v.* Haile, 12 Wheat. 370; Sherrill *v.* Hopkins, 1 Cowen, 103; Blanchard *v.* Russell, 13 Mass. 1; Ory *v.* Winter, 16 Mart. La. 277; Potter *v.* Brown, 5 East, 124; Robinson *v.* Bland, 1 W. Bl. 257.

(*y*) The mode of suing and the time of suing must be governed by the *lex fori*, i. e. by the law of the place where the action is brought. Huberus de Confl. Leg., sec. 7; De la Vega *v.* Vianna, 1 B. & Ad. 284; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Hodges *v.* Shuler, 24 Barb. 68; Dunscomb *v.* Bunker, 2 Met. 8; Fenwick *v.* Sears, 1 Cranch, 259; Le Roy *v.* Crowninshield, 2 Mason, 151. In Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 207, the Chief Justice said: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." Powers *v.* Lynch, 3 Mass. 77; Williams *v.* Jones, 13 East, 439. *Semble contra*. Upon the principles above stated, it was held in Leroux *v.* Brown, 12 C. B. 801, 14 Eng. L. & Eq. 247, that the Statute of Frauds does not make agreements void, but only prevents their being enforced by action, and, therefore, a parol agreement not to be performed in a year, though made in France and valid there, cannot be enforced in England. It seems, then, that the consequences of the breach of a contract depend upon the law of the country where they are enforced. Cooper *v.* Waldegrave, 2 Beav. 282. But it is said that the damages given under the name of interest for the non-payment of a note at a stipulated time will be regulated by the law of the place where payment was to be made. Peck *v.* Mayo, 14 Vt. 33. For a full discussion of the rule concerning remedies, consult Wood *v.* Watkinson, 17 Conn. 500. Among the English authorities holding the same doctrines, that the remedy depends on the *lex fori*, the most worthy of attention are, Don *v.* Lippmann, 5 Clarke & F. 1, 12, 21; British Linen Co. *v.* Drummond, 10 B. & C. 903; De

Sixth, the *lex loci contractus* depends not upon the place where the note or bill is made, drawn, or dated, but upon the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee. It has been frequently stated, that a note is nothing until delivered; and that indorsement is not merely writing, but transferring from the hand of the one party to that of the other. And intimately connected with this rule is the law of contracts by letter. If a New York merchant in Boston buys and receives goods, and gives his note for them, this is a Boston note, unless it specifies another place of payment; and if it be a Boston note, it is to be governed by the law of Massachusetts. If payable specially elsewhere, it must be demanded there, and be construed by the law of that place.

If he remained in New York and made his purchase by correspondence, this would be a Boston contract, and a note sent to Boston would be a Boston note, unless specially payable elsewhere; provided the goods were delivered to him actually or constructively in Boston, or by delivery to his agent or carrier whom he so pointed out as to make him his agent.

If, however, it was a part of the bargain that the seller should send the goods to New York, deliver them there, and retain the property in and the risk of the goods until they were so delivered, and being so sent, a note dated in New York was given to the seller or his agent in New York, we should say it was a New York note. If it were not given to the seller or his agent there, but sent, at the risk of the sender, to the seller in Boston, we should be inclined to call this also a Boston note.(*z*)

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la Vega *v.* Vianna, 1 B. & Ad. 284; Huber *v.* Steiner, 2 Scott, 304, 1 Hodges, 106, 2 Bing. N. C. 202, 2 Dowl. Prac. Cas. 781, 4 Moore & S. 328. The form of the remedy is declared to be determined by the law of the State where the remedy is enforced and the action brought. Henry *v.* Sargeant, 13 N. H. 321; Martin *v.* Hill, 12 Barb. 631; Titus *v.* Hobart, 5 Mason, 378; Robinson *v.* Campbell, 3 Wheat. 212; Blanchard *v.* Russell, 13 Mass. 15; Smith *v.* Spinolla, 2 Johns. 198; Andrews *v.* Herriot, 4 Cowen, 508; Wood *v.* Malin, 5 Halst. 208; Ayres *v.* Audubon, 2 Hill, S. C. 601; Watson *v.* Brewster, 1 Barr, 381; Givins *v.* Western Bank of Ga., 2 Ala. 397; Smith *v.* Atwood, 3 McLean, 545; McKissick *v.* McKissick, 6 Humph. 75; Wood *v.* Watkinson, 17 Conn. 500; Broadhead *v.* Noyes, 9 Misso. 55; Dorsey *v.* Hardesty, id. 157; Dixon *v.* Ramsay, 3 Cranch, 319; Nash *v.* Tupper, 1 Caines. 402; Ruggles *v.* Keeler, 3 Johns. 263; Bird *v.* Caritat, 2 Johns. 342; Sicard *v.* Whale, 11 id. 194; Bainbridge *v.* Wilcocks, Baldw. C. C. 536; Ohio Ins. Co *v.* Edmondson, 5 La. 295; Jones *v.* Hook, 2 Rand. 303; Wilcox *v.* Hunt, 13 Pet. 378; Ferguson *v.* Clifford, 37 N. H. 86.

(*z*) Notes *drawn* and *dated* at Baltimore, but *delivered* in New York in payment of

SECTION IV.

OF FOREIGN AND INLAND BILLS.

It seems to be important to determine whether a bill is foreign (outland, as Marius terms it) or inland; for with regard to them there are some important distinctions. It is well known that foreign bills were negotiable originally by the law merchant, and that inland bills were put upon the same ground by statute.(*a*)

So we have seen that, in accordance with the rules of the law

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goods purchased there, are payable in and to be governed by the laws of New York. Cook *v.* Moffat, 5 How. 295. The plaintiffs below had sold goods to the defendant, and on settlement had taken notes from the defendant's attorney in New York, to whom they had been transmitted. The defendant took the benefit of the Maryland insolvent law. *Grier*, J. said: "Although the notes purport to have been made in Baltimore, they were delivered in New York in payment of goods furnished there, and of course were payable there and governed by the laws of that place." If a merchant orders goods from England, and the English merchant executes, the contract is governed by the law of England; the contract is then completed. Casaregis, Dis. 179; Whiston *v.* Stodder, 8 Mart. La. 95; M'Intyre *v.* Parks, 3 Met. 207, decides that where a proposal to purchase goods is made by letter, sent to another State, and is there assented to, the contract of sale is made in that State. *Wilde*, J. said: "Nor is it of any consequence that the proposal of Braynard to purchase the lottery-tickets was made by a letter dated at Boston. It was the assent to the sale which completed the contract." In Hyde *v.* Goodnow, 3 Comst. 266, per Mr. Justice *Harris*, two notes signed in Ohio, for value received, were void by the law of that State; but being delivered in New York, it was held that the place of delivery controlled the contract as to its validity. The same law with regard to usury, the place of delivery controlling the note and regulating its validity. Jacks *v.* Nichols, 3 Sandf. Ch. 313, 5 Barb. 38, 1 Seld. 178. The contract was made in New York, and the notes there dated, but delivered in Connecticut. Some of them were payable in New York, some payable generally. The law of New York was held to control the contract, which must be considered entire. De Wolf *v.* Johnson, 10 Wheat. 367. In Depau *v.* Humphreys, 20 Mart. La. 1, the note was dated and payable in another State, but delivered at New Orleans, and the highest rate of Louisiana interest stipulated on the loan which was made in that State In Davis *v.* Coleman, 7 Ired. 424, the note was made in North Carolina, and delivered in Georgia, for a loan there made. The contract was considered that of the latter place. So where a note was indorsed for the accommodation of the maker in Detroit, and delivered in New York, the indorsement was held to be governed by the law of New York. Cook *v.* Litchfield, 5 Sandf. 330.

(*a*) 3 & 4 Anne, ch. 9. "I remember," said *Holt*, C. J., "when actions upon inland bills of exchange did first begin, and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which Hale, who tried it, laughed and said, they had a hopeful case of it." Buller *v.* Crips, 6 Mod. 29, 1 Salk. 130, Holt, 119

merchant, a foreign bill must be protested,(*b*) in order to hold the drawer and indorser, and a protest affords satisfactory evidence to a drawer of the dishonor of a bill, who from residence abroad might find it difficult otherwise to ascertain with certainty his liabilities. And foreign courts give credence to the acts of a public officer, and protest under the seal of a foreign notary is received in evidence of the dishonor abroad. But protest of an inland bill is, however, unnecessary, unless, as in some of our States, it is made by statute necessary to the recovery of damages.(*c*)

In a like manner in England a stamp is required to render an inland bill valid, but none is required upon a foreign bill.

Inland bills there are such as are both drawn and payable in the State where they are sued.(*d*) Foreign bills are such as are drawn, or payable, or both, in a foreign State, or drawn in one realm of the United Kingdom of Great Britain and Ireland, and made payable in another.(*e*) Bills drawn in one State of the United States, and payable in another, or made or payable in a State other than that in which it is sued, are regarded as foreign, as we have said before.

A bill drawn in England on a person residing abroad, and accepted *payable in England*, has been held an inland bill within the stamp act.(*f*)

When a bill is sued upon, it is presumed to be an inland bill, and if the contrary fact is relied on it must be proved. And that the bill is foreign must appear in the declaration, or an action upon such a bill may be defeated by traversing the ordinary allegations.(*g*)

But if a bill purport to be drawn abroad, and so claims any especial right or advantage or excuse on this ground, it may be

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(*b*) Borough *v.* Perkins, 1 Salk. 131, 2 Ld. Raym. 992, 6 Mod. 80. See also Trimbey *v.* Vignier, 1 Bing. N. C. 151, 4 Moore & S. 695, 6 Car. & P. 25, as to protest of a French bill payable in France. On the same point, see Payne *v.* Winn, 2 Bay, 374; Union Bank *v.* Hyde, 6 Wheat. 572; Duncan *v.* Course, 1 Const. R. 100; Read *v.* Bank of Ky., 1 T. B. Mon. 91; Carter *v.* Burley, 9 N. H. 558; Nelson *v.* Fotterall, 7 Leigh, 179.

(*c*) See *ante*, chapter on Protest.

(*d*) 2 Bl. Com. 467; Rothschild *v.* Currie, 1 Q. B. 43.

(*e*) See cases cited *ante*, note *b*.

(*f*) Amner *v.* Clark, 2 Cromp. M. & R. 468.

(*g*) Armani *v.* Castrique, 13 M. & W. 443. The courts of a State must be gov-

shown by evidence that it was in fact drawn at home.(*h*) But there is not only a presumption that a bill purporting to be drawn abroad was actually so drawn, but it would seem that this presumption is a very strong one, and can be overthrown only by conclusive evidence.

It is said in one of the late English cases in which a question arose under the stamp act, that the fact of the bill being made at home, though purporting to be drawn abroad, may be shown by a party cognizant of the fraud against an innocent holder.(*i*)

Bills or notes made in this country, and payable or accepted generally, may be enforced in England, although they have no stamps; but an English statute excepts from this rule those payable to bearer. Bills payable in this country, but drawn in England, could be enforced here, but not there, without a stamp.(*j*) This is upon the ground that the courts of one State or nation will not regard the revenue laws of another.(*k*) But it is still true, that, if a contract is made void by the revenue law of the country in which it is to be executed, the courts of that country will not enforce the contract.(*l*)

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erned by the laws of that State. *Prima facie*, then, a contract must be supposed to be governed by the law of the forum, unless it be shown to have been entered into elsewhere. Hutchins *v.* Hanna, 8 Ind. 533. If it is claimed that the law of the place of contract establishes a rule unknown to our law, it should be proved, and should properly be averred and set out in the pleadings. Bean *v.* Briggs, 4 Iowa, 464.

(*h*) In Abraham *v.* Dubois, 4 Camp. 269, it was held that proof that the bill which purports to be foreign is really inland, must be very clear and convincing. In this case a bill was dated at Paris on the 1st of March. The drawee was proved to have been in London at eleven o'clock, A. M. on March 3d. Lord *Ellenborough* said: "It is not very probable that the bill was drawn at Paris on the 1st of March; but if that were proved ever so distinctly, it would not alone be enough to show that the bill was drawn in England. To draw a bill here purporting to be drawn abroad for the purpose of evading the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence." Biré *v.* Moreau, 2 C. & P. 376.

(*i*) Steadman *v.* Duhamel, 1 C. B. 888.

(*j*) Rotch *v.* Edie, 6 T. R. 413; Boucher *v* Lawson, Cas. Temp. Hardw., Lond. ed. 194; Holman *v.* Johnson, 1 Cowp. 341; Clugas *v.* Penaluna, 4 T. R 466.

(*k*) James *v.* Catherwood, 3 D. & R. 190; Wynne *v.* Jackson, 2 Russ. 351. See Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Camp. 166, *contra*.

(*l*) Scriba *v.* N. A. Ins. Co., 1 Wash. C. C. 408, 2 id. 407. Alves *v.* Hodgson, 7 T. R. 241, was an action on a promissory note, payable in London. The action failed from due want of a Jamaica stamp. The case of Clegg *v.* Levy, quoted *supra*, was one in which an agreement for partnership in Surinam failed as evidence by reason of the want of a stamp at Surinam; see remarks of *Rolfe*, B., in Bristow *v.* Sequeville, 5 Exch. 279: "I agree that if, for want of a stamp, a contract made in a foreign country is void, it cannot be enforced here." We think these cases overrule James *v.* Cather

A bill drawn here upon a drawee in England need not have a stamp, for such a rule would conflict with every principle of the law merchant. But a bill drawn in England on a drawee abroad, but made specially payable in England, would need a stamp in England, as we have seen before; (*m*) and if such a bill were dishonored in England, where alone it was payable, and afterwards, after due demand in England, it was put in suit against the acceptor in this country, he being found here, would our courts decline recognizing the revenue laws of a foreign country, which is the general rule, or would they put such a case upon the footing of an unstamped English bill, where all the parties lived in England, and would they say that the home laws determined the validity of a home bill in this respect, as in all others? It may not be certain, but we incline to think they would hold this latter doctrine.

But when a contract to which there are several parties is evidenced by one single instrument, the place where it begins to have operation determines what form it should have. The bill of exchange presents the most common instance of this.(*n*) It must be understood that the liability of particular parties may be separated from the general validity of the bill of exchange.

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wood, 3 Dow. & R. 190, and Wynne *v.* Jackson, 2 Russ. 351. The doctrine that the revenue laws of another country are not to be regarded, although they avoid a contract, seems not to be certain. In Ludlow *v.* Van Rensselaer, 1 Johns. 94, a promissory note made in France, payable in New York, was held good, though wanting the French stamp, on the ground that stamps depend upon the *lex loci solutionis*, or that no regard should be paid to foreign revenue laws. In Vidal *v.* Thompson, 11 Mart. La. 23, the opposite doctrine was held. See *ante*, note *i*.

(*m*) Amner *v.* Clark, 2 Cromp. M. & R. 468.

(*n*) In Snaith *v.* Mingay, 1 Maule & S. 87, the Irish stamp was held sufficient on a bill drawn in Ireland with blanks for the sum, time of payment, and drawee's name, which being signed and indorsed by the drawer, were afterwards sent to his correspondent in England, with authority to fill up, Mr. Justice *Bayley* observing that, if before the blanks were filled the drawer had died, and then the blanks had been filled, his (the drawee's) executors would have been held. But the acceptance on a blank stamp will not do, the bill being afterwards drawn in a country requiring a different stamp for the acceptance has relation to the drawing, and not *vice versa*. Abrahams *v.* Skinner, 12 A. & E. 763. By stat. 17 & 18 Victoria, c. 83, § 5, a stamp is required on foreign bills presented for payment in England, so that the effect of the general principle is now restrained to exempting foreign bills from the British stamp laws, when presented for acceptance in England. Sharples *v.* Rickard, 2 H. & N. 57. This does not seem consistent with Hamelin *v.* Bruck, 15 Law J., N. S., Q. B. 343, in which case it was said that an English stamp was necessary on a bill which was accepted in England for a sum smaller than the sum for which it was drawn abroad.

The indorser may not be liable unless the law of the place of indorsement be satisfied, but the bill may nevertheless be valid. If the law do not expressly impose a stamp upon indorsement of bills, the stamp which may be generally imposed on a bill will not be made necessary by the indorsement within the jurisdiction,(*o*) — the stamp will depend on the place of drawing.(*p*) By the late Statutes in England, 17 and 18 Vict. c. 83, § 5, a stamp is imposed on the indorsement of bills. The question may arise, if a bill be sufficiently stamped when drawn, and the indorsement is invalid for want of a stamp in England, if that will discharge subsequent foreign indorsers who may have relied upon such indorsement which proves invalid. This difficulty has been foreseen and provided for by the Congress of the North German States at Frankfort in 1848.(*q*)

The actual place of drawing or indorsing, as affecting the admissibility of the bill in evidence, must, so far as the stamp is concerned, be determined by the judge, and not the jury.(*r*)

Pardessus states that the draft of one London merchant upon another would be negotiable in France, but the draft of one Parisian merchant on another is invalid, or at least non-negotiable in England.(*s*)

(*o*) Holdsworth *v.* Hunter, 10 B. & C. 449.

(*p*) See case cited in preceding note.

(*q*) See the 85th art. of an uniform law on bills of exchange, drawn in 1847 and enacted in 1848 by the National Assembly at Frankfort, and since adopted by all of the states of the confederacy, with some slight variations. The article, as quoted from Levi's Commercial Law, Vol. II. p. 73, is as follows: "The differences arising upon the fulfilment of the essential conditions of a bill of exchange drawn in foreign countries, or in any other contract of exchange made abroad, ought to be adjudicated according to the laws of the country whence the bill has been drawn and the engagement taken. Nevertheless, if the clauses inserted in foreign bills accord with the requirements of the German law, the objection that they are deficient according to the law of that country cannot be urged against them to the effect of invalidating the subsequent indorsements inserted in Germany. In like manner the clauses contained in such bills, according to which a German binds himself towards another German in a foreign country, are effectual if they accord with the requirements of the German law."

(*r*) Bartlett *v.* Smith, 11 M. & W. 483; Bennison *v.* Jewison, 12 Jur. 485. Very stringent proof is required of misdating a bill for the purpose of avoiding the stamp act. Abraham *v.* Du Bois, 4 Camp. 269; Biré *v.* Moreau, 2 Car. & P. 376; Stat. 17 & 18 Vict., c. 83, § 4.

(*s*) Droit Comm., § 1485.

SECTION V.

PRESUMPTIONS AS TO BILLS AND NOTES.

If a bill be drawn payable expressly at a particular place, there can be no question as to its *lex loci contractus*. The same with regard to a note is true. The language used might be such as to declare this by intendment and construction of law; but if a note be dated and payable generally, i. e. with no particular place of payment expressed, — or at least no place different from that in its date, — and no words upon the face of it to import restriction or direction, the presumption of law is that it is payable where made.(*t*) This is in accordance with the general

(*t*) If no place be designated in a note as a place of payment, the law of the place where it is made determines its construction, obligation, and place of payment. This rule is applied to almost all the questions which arise in the law of negotiable paper. Thus, if the law of that place gives three days of grace, the maker is entitled thereto, if he resides elsewhere, before demand can be made and the indorser fixed. Bryant *v.* Edson, 8 Vt. 325; Bank of Orange Co. *v.* Colby, 12 N. H. 520; Sherill *v.* Hopkins, 1 Cowen, 103. Interest on such a contract is payable according to the laws of the country where the contract is made; but if by the terms or nature of the contract it appears that it is to be executed in another country, or that the parties had reference thereto, then it is immaterial in this respect where the contract was made, and it is to be governed by the laws of the country where it is to be performed. Fanning *v.* Consequa, 17 Johns. 511. "Where the acceptance of a bill is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting the debt." Per Lord *Brougham*, in Don *v.* Lippmann, 5 Clarke & F. 1, 12, 21. In the same place it is mentioned as a peculiarity of the law of Scotland, that, "where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due." As to the introduction of parol evidence to show that a note is payable at a particular place not mentioned in the note, we have the case of Thompson *v.* Ketcham, 8 Johns. 189, per Mr. Chancellor *Kent*. In that case a note was made in Jamaica. The question arose whether parol evidence was admissible to show that payment was intended to be made in New York. The Chief Justice said: "When this cause was formerly before the court, — 4 Johns. 285, — the admissibility of the testimony relative to the agreement to pay the note in New York was not drawn in question; for the testimony had been admitted without objection. This point is not, therefore, to be considered as having been decided in that case. *The evidence was not admissible.* The time of payment is part of the contract, and if no time be expressed, the law adjudges that the money is payable immediately. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts; . . . . and it is against established rule to vary the operation of a writing by parol proof." Bank of Orange Co. *v.* Colby, 12 N. H. 520; Stacy *v.* Baker, 1 Scam. 417; Russell *v.* Buck, 14 Vt. 147; Bliss *v.* Houghton, 13 N. H. 126; Reddick *v.* Jones, 6 Ired. 107; Emerson *v.* Partridge, 27 Vt. 8; Mullen *v.* Morris, 2 Barr, 85.

rules regulating the *lex loci contractus*. Then no evidence would be admissible to prove that in fact it was agreed to be paid in some special place, different from that where it was made, and therefore must be brought under the law of that place. Nor would this be inferred from the fact that the acceptors resided in a certain place different from that where the bill was drawn.(*u*) This rule rests on the same principle which, as we have already seen, requires, that if it be payable generally, this means, in law, payable on demand, and no evidence is receivable to prove that it is to be paid only after a certain time, because this would be to vary the terms of a written contract by oral testimony.

It will be presumed with regard to negotiable paper, that the foreign law is the same as the law of the forum, till the reverse is proved.(*v*) It therefore will lie upon the defendant, as any one alleging a difference, to show this, and in pleading, the foreign law must be alleged, and the facts stated so as to bring the case within them.(*w*) But in a case in Iowa, it was held, that where a note was made in Missouri, and indorsed in Maryland, and the indorser sued in Iowa, the maker need not first be sued before the indorser was liable, although the law of Iowa requires this. It did not appear that there was such a statute in Maryland, which was the place of the indorsement.(*x*)

SECTION VI.

OF THE LAW OF PLACE AS APPLICABLE TO THE VARIOUS PARTIES TO NOTES AND BILLS.

After the *lex loci contractus* of a bill or note is determined, the rights of the various parties to such a negotiable instrument have to be considered in relation to the place or places in which they assume their various obligations with regard to the instru-

(*u*) Frazier *v.* Warfield, 9 Smedes & M. 220.

(*v*) Martin *v.* Martin, 1 Smedes & M. 176; Brown *v.* Gracey, Dowl. & R., N. P. 41, note. See also De La Chaumette *v.* Bank of England, 9 B. & C. 208; Fouke *v.* Fleming, 13 Md. 392. No other guide being presented, of course the *lex fori* must be allowed to control. Whidden *v.* Seelye, 40 Maine, 247.

(*w*) Benham *v.* Mornington, 3 C. B. 133.

(*x*) Bernard *v.* Barry, 1 Greene, Iowa, 388.

ment under consideration. We shall hereafter discuss the law of place as affecting the remedy on negotiable instruments.

It seems to be in accordance with general principles and general rules, that bills of exchange are to be governed generally as to their nature, validity, interpretation, and effects, by the law of the State or country where the parties to the particular contract under consideration were when the contract had its origin.

The parties to notes and bills are the maker or drawer, the payee or promisee, the indorser, the indorsee, and the acceptor. All the parties except the last are common to notes as well as bills; but it has already been shown that after the acceptance of a bill, the acceptor stands very nearly in the position of promisor on a note, and the drawer of a bill occupies very nearly the same place as the first indorser of a promissory note.

Bearing these correspondences in mind, we shall, as far as possible, consider the liabilities of the parties to both instruments at the same time, and in the same order in which they are arranged above, disregarding the many respects in which the law of each runs into that regulating the other.

Under the different views which different jurisdictions have taken, it seems that different contracts, of various natures and obligations, may arise between different parties under one and the same bill of exchange.

The rights of a holder are correlative to those of the other parties, and the rights of the other parties being known, the holder's rights are easily discovered. The rights of the other parties with relation to each other are much the same as towards a holder who is the payee.

SECTION VII.

OF THE LAW OF PLACE AS APPLICABLE TO THE MAKER OR DRAWER.

If one makes a promissory note payable generally, as appears above, he has a right to require that the law of the place where the note is made and payable should govern the contract, except so far as the *lex fori* may modify his rights. The same rule must govern the drawer and acceptor of a bill payable gen-

erally.(*y*) We have seen that no evidence would be admitted to prove that in fact it was agreed to be paid in some special place, and therefore must be brought under the law of that place; and that this would not be inferred from the fact that the acceptor resided in a certain place different from that where the bill was drawn.(*z*)

The law of the place of payment also determines what is a default of the maker.(*a*) If a note be made payable or a bill be drawn on a particular place, the general rule would be, that the law of the place where payable would govern the note with regard to protest and notice,(*b*) for the place of performance is the proper *locus* of a contract. The same rule would hold good as to interest, if it were mentioned generally.(*c*) But it is laid down that the law of the place of making or drawing a bill must decide what circumstances will dispense with the necessity of making demand and notice.(*d*)

But it seems that in this respect a species of election exists. A promisor in San Francisco, where there are no usury laws, makes a negotiable note payable in Boston, where all interest beyond six per cent is prohibited, and makes it payable with twelve per cent interest. We think this a valid note, and that this twelve per cent would be recoverable in Boston, because it would be protected by the laws of San Francisco, and the maker had the right to elect between the two laws, or, in other words, wherever the note was payable the promisee was still entitled to

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(*y*) Bank of Orange Co. *v.* Colby, 12 N. H. 520; Bowen *v.* Newell, 3 Kern. 290; Bryant *v.* Edson, 8 Vt. 325; Story, Confl. of Laws, § 264.

(*z*) Frazier *v.* Warfield, 9 Smedes & M. 220.

(*a*) Hatcher *v.* McMorine, 4 Dev. 122; Dow *v.* Rowell, 12 N. H. 49; Holt *v.* Salmon, Rice, 91; Dunn *v.* Adams, 1 Ala. 527; Yeatman *v.* Cullen, 5 Blackf. 240; Lowry *v.* Western Bank, 7 Ala. 120; Holbrook *v.* Vibbard, 2 Scam. 465; Musson *v.* Lake, 4 How. 262; Cox *v.* Adams, 2 Ga. 158; Dundas *v.* Bowler, 3 McLean, 397; Bank of Illinois *v.* Brady, id. 268; Powers *v.* Lynch, 3 Mass. 77; Prentiss *v.* Savage, 13 Mass. 20, 23, 24; Slacum *v.* Pomery, 6 Cranch, 221; Depau *v.* Humphreys, 20 Mart. La. 1, 14, 15; Hicks *v.* Brown, 12 Johns. 142; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Rothschild *v.* Currie, 1 Q. B. 43; Potter *v.* Brown, 5 East, 124; Winthrop *v.* Pepoon, 1 Bay, 468; Lanusse *v.* Barker, 3 Wheat. 101, 146; Kissam *v.* Burrall, Kirby, 326; Gaillard *v.* Ball, 1 Nott & McC. 67.

(*b*) See *ante*, p. 324, note *u*.

(*c*) See *ante*, p. 324, note *u*.

(*d*) Story on Bills, §§ 176, 285, 296, 366, 391; Chitty on Bills, pp. 506–508 (8th London ed. 1833); 1 Boullenois, Observ. 23, pp. 531, 532; Aymar *v.* Sheldon, 12 Wend. 439; Pardes. Droit Com., tom. 5, art. 1488, 1491, 1499; Humphreys *v.* Cutler, 1 Breese, 231

the benefit of the law where the note was made, provided the interest of that place was agreed upon, and the maker of the note is bound also to pay it; for there it may be supposed that the money was borrowed, or the goods sold, or other consideration passed, although he should be elsewhere when the note was payable.(*e*)

(*e*) In Andrews *v.* Pond, 13 Pet. 65, 72, Mr. C. J. *Taney* said: "If the interest allowed by the laws of the place of performance is higher than that permitted by the laws of the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." In the same case it was held, however, that if the contract is forbidden as usurious by both the law of the place where made and where payable, then the law of the place where made governs as to its invalidity. Story's Confl. Laws, 203. In De Wolf *v.* Johnson, 10 Wheat. 367, it was held that the *lex loci contractus* must govern as to usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another State. The existence of this election of interest where a note is made in one country and payable in another, is fully confirmed in Depau *v.* Humphreys, 20 Mart. La. 1, which is a very full case, and one accompanied by an exhaustive discussion of all the authorities. It is clear that, if a note were dated as at a place where a higher interest was allowed than at the place where it was given, and this were done to cover usury, it would not be allowed by the courts; but it may be more doubtful in a case where a note is made in one State, payable in another, and the interest of the former stipulated in the note, and yet a delivery of the note made in the latter place, where it is to be paid; for it seems that the place of effectual delivery controls the *locus* of a note as well as an indorsement. This case may easily arise where the note is made in Baltimore and sent to New York by letter. This question might be one of much importance. As to election as to interest, see Peck *v.* Mayo, 14 Vt. 33. In Chapman *v.* Robertson, 6 Paige, 627, a case occurred somewhat similar to De Wolf *v.* Johnson, 10 Wheat. 367, *supra*. A debtor borrowed money in England upon a bond and mortgage executed in New York, on lands in New York, and at the New York rate of interest; it was held that the mortgage was a valid security for the bond, and that the English usury law was no defence. The decision in Depau *v.* Humphreys, 20 Mart. La. 1, was before the court, and fully reviewed by Mr. Chancellor Walworth. In Van Schaick *v.* Edwards, 2 Johns. Cas. 355, a note was held valid which was made in Massachusetts, payable in New York, where the holder resided, although the interest was usurious by the law of Massachusetts. Mr. Justice Story, Confl. Laws, § 298, doubts the correctness of the conclusion of the courts with regard to election of interest, and thinks that the foreign jurists quoted in support of the theory do not support it, and says, § 299 a: "They nowhere assert that one and the same rule is not to apply throughout to all the stipulations in the contract." He says that the *lex loci solutionis* is the *lex loci contractus*, except with regard to mere formalities of the making. In Jacks *v.* Nichols, 1 Seld. 178, 3 Sandf. Ch. 313, 5 Barb. 38, the plaintiffs, who were watchmakers in New York, applied to the defendants, residents of Georgia: "We propose to pay Mr. N. for the use of the money he may loan us, as follows: interest 7 per cent per annum, 5 per cent of the exchange from Savannah, and 2½ per cent on all sales of watch movements made by us." The notes and securities were given in New York, which were there renewed, and again renewed when the defendant was in Connecticut where the securities were delivered to him. The notes were declared void by the assistant Vice-Chancellor, his decision reversed by the Su-

A due caution, however, might prevent this question from arising. For if the maker of the note in San Francisco had not made it payable in any particular place, it could be demanded by the holder of the promisor wherever he might be, and no question should be made anywhere as to its validity, if it were clearly valid and legal where it was made.

The question may arise as to the liability of a maker or any other party to a negotiable instrument, which has been transferred in a country foreign to that in which it was made. This question we shall consider more fully in connection with transfer as affected by the law of place. We think, however, that a transfer, though legal where made, ought not to be held good unless it is good in the place of contract. But we think also that a transfer which may not be valid where made, may with propriety be held valid in the place of contract, if sanctioned by the law of that place.

If no place of payment be named in the note, the law of the place where made determines this, as we have often remarked. And by this must be determined the construction and obligation, and the place of payment. Even if a maker resides elsewhere, it seems that he is entitled to days of grace according to the law of the place where the note was made (or delivered), before demand can be made, and the indorser fixed.(*f*)

The liability of the maker of a contract depends upon the *lex loci contractus*, even though the contract is negotiable. If by the law of the place of contract equitable defences are allowed in favor of the maker, any subsequent indorsement will not change his right in regard to the holder.(*g*)

It is true of the drawer or maker, as well as of the other parties to bills or notes, that the place of their contract is to be

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preme Court, but confirmed by the Court of Appeals. The renewal was a New York transaction. In Depau *v.* Humphreys, 20 Mart. La. 1, a note was made in Louisiana, with interest at ten per cent. It was payable in New York, and the right of election of interest was maintained. Chapman *v.* Robertson, 6 Paige, 627, is to the same effect. Carnegie *v.* Morrison, 2 Met. 381. In Berrien *v.* Wright, 26 Barb. 208, a sale of land situated in Florida was negotiated. Notes payable in Florida were given in New York, and eight per cent reserved as interest thereon; but they were not held usurious.

(*f*) See *supra*, p. 336, note *y*.

(*g*) Chartres *v.* Cairnes, 16 Mart. La. 1; Ory *v.* Winter, 16 id. 277; Evans *v.* Gray, 12 id. 475; Stacy *v.* Baker, 1 Scam. 417.

regarded as to the measure of damages.(*h*) But he cannot avoid liability because the law of the place where the bill was drawn is not complied with — as is sometimes said (*i*) — in every particular. But it may nevertheless be true that the contract of the drawer or maker as to the form, validity, and nature of the contract is governed, as to payees or subsequent holders, by the place where the bill is drawn or made.

SECTION VIII.

OF THE LAW OF PLACE AS APPLICABLE TO THE ACCEPTOR OR INDORSERS.

If a bill be made payable abroad, and have indorsers at home, and a home indorsee sues a home indorser, in a home court, the question may arise whether the defendant can require of the plaintiff a conformity with the laws of the country in which the note is payable, in respect to presentment, demand, and notice; or, if the plaintiff has complied with those foreign laws, can the defendant require of him a compliance with the home laws.

Let us suppose, for example, that the law of protest and notice in France differs from the law in New York, and a bill is drawn in New York on merchants in Paris, and is indorsed in New York to an indorsee residing there. The bill is dishonored in Paris, and then protested and notice given according to the law of France. The New York indorsee sues the New York indorser in New York, and the defendant proves that the protest and notice did not conform to the law of New York. According to the English authorities, the plaintiff would prevail, because he would be sustained by the *lex loci contractus*.(*j*)

(*h*) Poth. Ob., note, 171; Slacum *v.* Pomery, 6 Cranch, 221; Hazelhurst *v.* Kean, 4 Yeates, 19; Harrison *v.* Edwards, 12 Vt. 648; Bailey *v.* Heald, 17 Texas, 102.

(*i*) Crawford *v.* Branch Bank at Mobile, 6 Ala. 12.

(*j*) If a bill be made in England, payable in France, it is a foreign bill as between drawer and payee. Notice of the dishonor of a foreign bill is to be given according to the law of the place where acceptance is dishonored, though the other parties reside in another country. The same rule prevails with regard to protest. Rothschild *v.* Currie, 1 Q. B. 43; Ellis *v.* Commercial Bank, 7 How. Miss. 294, per *Gaston*, J. Hatcher *v.* McMorine, 4 Dev. 122. But in Aymar *v.* Sheldon, 12 Wend. 439, the circumstances were these. A bill was drawn in Martinique, one of the French West India Islands,

In a case in New York, in which the facts were as supposed, except that the protest and notice conformed to the law of New York, and did not conform to the law of France, the plaintiff was permitted to prevail, on the ground that, while the law of

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on a house in Bordeaux. It was transferred in the city of New York by the *payee*, against whom the suit was brought by the indorsee. It appeared that by the French Code de Commerce a bill must be protested for non-payment as well as non-acceptance, in order to hold the previous parties. The bill on which the action was brought was not presented for *payment* after it had been protested for *non-acceptance*. It was held, that under these circumstances the indorsee might recover, having complied with the requirements of the law of the place of indorsement. In such a case it was held that the drawer could require the payee to comply with the law of the place upon which the bill was drawn. The case was said to be one of first impressions, and the decision was put upon the ground that no principle was more fully settled, or better understood, than that the contract of the indorser was a new and independent contract, and that the extent of his obligation is determined by it. Bank of Washington *v.* Triplett, 1 Pet. 25, holds that if the law of the place on which the bill is drawn is followed the drawer will be held. In the case of Worcester Bank *v.* Wells, 8 Met. 107, it was held that if a drawee accept a bill in New York, when it was drawn in another State, by the drawer who resides in that other State, the contract of acceptance as to presentment, &c. is governed by the law of New York. Hatcher *v.* McMorine, 4 Dev. 122, was decided upon the doctrine of Aymar *v.* Sheldon, 12 Wend. 439. In Allen *v.* Merchants' Bank of New York, 22 Wend. 215, overruling s. c. 15 Wend. 482, a bill was drawn in New York upon a drawee in Philadelphia. It was not accepted, but of this the notary gave no notice to the indorsers. The indorsers were thereby excused from payment, though it seems that the law of Pennsylvania did not require the notary to give such notice, it being quite sufficient if notice of non-payment be given. In that case the bank in New York, to which the bill had been intrusted for collection, was held liable to the holder, because, by the neglect of the foreign notary, notice of non-acceptance was not given in accordance with the New York law. In Wallace *v.* Agry, 4 Mason, 336, 344, Mr. Justice *Story* seems to assent to the doctrine of Aymar *v.* Sheldon, 12 Wend. 439. We think the case of Rothschild *v.* Currie, 1 Q. B. 43, contains the true doctrine, as we have before remarked. See Astor *v.* Benn, 1 Stuart, Canada, 69, 70, to the same effect as Aymar *v.* Sheldon, 12 Wend. 439. In Rothschild *v.* Currie, the notice was in accordance with the law of France, where the bill was payable and dishonored. The notice was held good, as conforming to the *lex loci contractus*. Pothier, De Change, note 155, was much relied on. This author says that the form and time of making protest, as well as notice of it, are to be regulated by the place of payment of the bill. It would be universally agreed that, as to form, the protest must follow the law of the place where made; but the remarks of Pothier, as is plain, go further, and we think with justice; and for the same reasons that protest should be that of the country where made in regard to form, it should also follow the law of the country with regard to all that the notary has to do; i. e. to give notice, &c. But it is said that the *lex loci contractus* of the indorser's or drawer's contract is not the *place of acceptance*, but the place of indorsing or drawing; for it is said, the drawer or indorser does not agree to pay at the place of the acceptor's residence, but agrees that he shall pay, and in his default, to pay themselves at their respective places of drawing and indorsing. But it is not true that default of the drawee is contemplated by either party; and is it not reasonable to suppose that each indorser, knowing

the place where payable must be followed to hold the acceptor, or perhaps the drawer, — although his liability is sometimes said

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upon what place the bill is drawn, and in fact being a new drawer, intends or expects that the notary of the place where protest is made is going to act in accordance with his own law? It could not be urged for a moment, that it was not understood by the parties that a notary of the place of dishonor was to act; and if this is so, is it not understood that he will act according to his law? Suppose parties agree to have certain acts performed by a certain officer named, in a foreign country; will he not follow his own law? and does he not, then, in so following his own law, bind his principal and parties who are to be affected by his acts? Pardessus (Droit Com., tom. 5, art. 1488, 1497, 1499, pp. 252 – 255), however, seems to think that the contract of the indorser is one which the place of indorsement with regard to notice must govern, and every indorser have notice according to the law of the place of his indorsement. Id. 1485, 1489; see also Chitty on Bills, ch. 10, p. 490, 491, 8th ed. 1833, id. p. 506. A bill of exchange was drawn in New York on London, and was paid by the acceptor. The contract between acceptor and drawer was held to be one which was to be interpreted by the laws of England. Lizardi *v.* Cohen, 3 Gill, 430. A bill was drawn in another State upon New York, when the drawer resided in such other State. It was held by the Supreme Court of Massachusetts that the contract of acceptance was governed by the law of New York. In Lewis *v.* Owen, 4 B. & Ald. 654, where a bill was drawn on England by one in Ireland, and accepted and paid in England, this was held to be an English debt. Smith *v.* Buchanan, 1 East, 6; Quin *v.* Keefe, 2 H. Bl. 553. In Bainbridge *v.* Wilcocks, Bald. C. C. 536, bills were accepted in London on a promise to provide funds to meet them. This was held a London contract. In Boyce *v.* Edwards, 4 Pet. 111, it was held that, if a contract were made by a merchant to accept bills drawn on him by a merchant in another country, it is to be deemed a contract of the place where the acceptance is to be made. See also P. Voet de Statut., § 9, ch. 2, § 14, p. 271, ed. 1715, id. p. 327, ed. 1661. In Lanusse *v.* Barker, 3 Wheat. 101, 146, Barker of New York had authorized the plaintiff to draw bills from New Orleans upon himself; these were refused acceptance. New Orleans interest was recovered. Frazier *v.* Warfield, 9 Smedes & M. 220; 5 Pardes. 1795; Cooper *v.* Waldegrave, 2 Beav. 282; P. Voet de Statut., § 9, ch. 2, note 14, p. 270, ed. 1713, id. p. 327, ed. 1661; Van Schaick *v.* Edwards, 2 Johns. Cas. 355; Scofield *v* Day, 20 Johns. 102; Foden *v.* Sharp, 4 Johns. 183. In Warren *v.* Lynch, 5 Johns. 239, assumpsit was brought on an instrument made in Virginia and payable in New York. The note had a scrawl which is by the law of Virginia equivalent to a seal. It was held that the law of New York must determine the character of the instrument and the action to be brought upon it. There is one curious case, which may perhaps be more properly considered under the head of remedy than of right. In Grimshaw *v.* Bender, 6 Mass. 157, a bill payable in London was accepted at Manchester by a member of a Boston firm; suit was brought in Massachusetts. *Parsons*, C. J. said: "It is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this State, where the acceptors lived. The instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston, and it had been accepted payable in London by the house here." Ten per cent was recovered for re-exchange, according to the Boston rules in case of a bill drawn here on a foreign country and returned. This decision has been severely criticised. Story, Confl. § 319. In the case of a note made in Mississippi and indorsed in Louisiana, where the maker was sued, it was held that the defendant might use all

to depend on the law of the place where it is drawn,(*k*) — yet each indorsement was a contract by itself, and the law of the place in which the indorsement was made must determine the rights and obligations growing out of it.(*l*) Nor could the indorser require conformity with the laws of France, without making this a condition by a special indorsement.

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defences allowed by the law of Mississippi against the payee. Ory *v.* Winter, 16 Mart. La. 277; Ferguson *v.* Flower, 16 id. 312.

(*k*) Kearney *v.* King, 2 B. & Ald. 301; Don *v.* Lippmann, 5 Clark & F. 1; Sproule *v.* Legg, 3 Stark. 156, 1 B. & C. 16, 2 Dowl. & R. 15. It makes no difference, in such a case, where the bill is accepted, provided a place of acceptance be mentioned. Frazier *v.* Warfield, 9 Smedes & M. 220. In Don *v.* Lippmann, 5 Clark & F. 1, Lord *Brougham* mentions it as curious, that in the Scotch law the acceptor's domicil governs the bill. Cooper *v.* Waldegrave, 2 Beav. 282; Braynard *v.* Marshall, 8 Pick. 194; Wilde *v.* Sheridan, 11 Eng. L. & Eq. 380; Barker *v.* Sterne, 25 id. 502, hold that the contract of acceptance is made where the bill is accepted. In Allen *v* Kemble, 6 Moore, P. C. 314, 322, it is said if bills drawn in Demarara, payable in London, and accepted payable in London, are not paid by the acceptor, the liabilities of the drawer and indorser are determined by the law of Demarara. "London," said Leigh, Chancellor of Cornwall, "being fixed as the place of payment, they are payable by the drawee according to the law of England; — a different law is imported as regards the acceptor, but not as affects other parties." Crawford *v.* Branch Bank at Mobile, 6 Ala. 12. It seems clear that the acceptor is entitled to insist upon the law of the place of acceptance being followed. De La Chaumette *v.* Bank of England, 9 B. & C. 208. And if the law of the place on which the bill is drawn be followed, it seems clear that the drawer will be held. Bank of Washington *v.* Triplett, 1 Pet. 25; Worcester Bank *v.* Wells, 8 Met. 107. Although by our law acceptance be absolute and binding, it may by the foreign law be a qualified contract, and is governed by that law in all its consequences. Burrows *v.* Jemino, 2 Stra. 733; Vandeef *v.* Therasson, 3 Pick. 12; Lewis *v.* Owen, 4 B. & Ald. 654; 5 Pardes. § 1493. But it seems that, by the general practice and course of decisions, both drawer and indorser, upon the return of a foreign bill under protest, must pay damages according to the law of the place where the bill is drawn or indorsed. Hendricks *v.* Franklin, 4 Johns. 119; Graves *v.* Dash, 12 id. 17; Slacum *v.* Pomery, 6 Cranch, 221; Hazelhurst *v.* Kean, 4 Yeates, 19; Pothier, Ob. n. 171. Thus drawer and indorser may be liable to different rates of damages. This seems to us to arise from the clear rule that remedy depends upon the forum.

(*l*) Beawes, Pl. 251; Marius, 75, 89, 92, 101, 103, 112; Bailey, 6, 149, 5th ed. 249. The law of protest, so far as its form is concerned, is that of the place of payment; the person who makes protest is determined in the same way. If a seal is required by that law, it is indispensable everywhere. Bank of Rochester *v.* Gray, 2 Hill, 227; Tickner *v.* Roberts, 11 La. 14; Townsley *v.* Sumrall, 2 Pet. 170. The manner of the presentation, we think, must be determined in the same way, and conform to the custom of the place where payable. Bank of Rochester *v.* Gray, 2 Hill, 227. In Ross *v.* Bedell, 5 Duer, 462, it was said that the question of proper authentication of the certificate of protest must be determined by the law of the foreign State where the protest was made. Because each indorsement is a new contract, it is also laid down as a general rule that negotiable paper of every kind is construed and governed, as to the obligation of the drawer or maker, by the laws of the country where drawn or made; and as to that of the indorsers, by the law of the country where indorsed.

It would seem to follow, that if the law of France had been followed, and the law of New York had not been obeyed, the plaintiff could not have recovered, and then this authority would be exactly opposed to the English authority, unless it should be held by the courts there was an election in the case to comply with the laws of the place in which the bill was payable, or with those in which the indorsement was made; then compliance with the law of the place of payment (*lex loci solutionis*) would affect all parties, and therefore, although the New York indorsers could not insist that the law of France should be followed, yet, if there was in fact a conformity with that law, it would bind them. But we think that even this theory is excluded by the doctrine of a subsequent case, in which it is held that, if notice of the non-acceptance of the bill be necessary by the *lex loci contractus*, and unnecessary by the law of the place of presentment (and acceptance), the rule of the *lex loci contractus* must be followed.(*m*)

Potter *v.* Brown, 5 East, 124; Van Raugh *v.* Arsdaln, 3 Caines, 154; Ory *v.* Winter, 16 Mart. La. 277; Hicks *v.* Brown, 12 Johns. 142. Mr. Chief Justice *Marshall*, in Slacum *v.* Pomery, 6 Cranch, 221, said, that an indorsement was not understood to be merely a transfer of the paper, but a new and substantive contract. The circumstances of the case were these. A bill was drawn in Barbadoes, by a merchant residing there, upon merchants in Liverpool. The bill was indorsed by the defendant, who resided in Alexandria. The damages claimed were fifteen per cent, which was that allowed in Virginia. The damages allowed in Barbadoes were ten per cent. The indorser's contract was held to be a Virginia contract, and the indorser liable to the fifteen per cent damages. It was also implied that the drawer would be liable for damages by the law of Barbadoes, where the bill was drawn. As, however, an indorsement is not binding, or at least effectual, until the time when it is delivered or transferred, the place of effectual transfer must be considered as the place of contract. Cook *v.* Litchfield, 5 Sandf. 330. The case of Williams *v.* Wade, 1 Met. 82, is often quoted, to show that the indorser makes a new contract, governed by the laws of his own State. In that case a note was made and indorsed in Illinois, where, at the time of making the note, both maker and indorser resided. It was agreed by the parties, for the purposes of the hearing, that, by the law of Illinois, it is required, in order to charge the indorser of a note, that a suit shall be previously commenced against the maker, and be prosecuted with effect in the county in which the maker resides; and that no such proceedings had been had in this case. *Shaw*, C. J. said: "The note declared on being made in Illinois, both parties residing there at the time, and it also being indorsed in Illinois, we think the contract created by that indorsement must be governed by the laws of that State." The case does not fully support the head note, but we think the reasoning of the court goes so far as to make it necessary for the holder of a note to comply with the law of the indorser's place before the latter can be held. Then we may suppose a note made in America, payable in France, and indorsed in England. The English indorser is entitled to have his own law complied with, and this too though it does not appear where the bill or note was indorsed.

(*m*) See *supra*, p. 339, note *j*.

The days of grace may be affected by the law of place, as these days are not the same everywhere. The general rule would seem to be, that the days of grace are determined by the law of the place where the note is payable.(*n*)

If it be admitted that the drawer is entitled to have and insist upon a compliance with the law of the place where the bill is drawn, with regard to protest and notice, as a case in Alabama seems to imply,(*o*) then we should be willing to admit that the indorser of a bill would be entitled to require such compliance. But if we understand the New York case aright, — and it admits of more than one solution, — it excludes the idea of any election being allowed the holder as against the indorser. We doubt, therefore, whether it be right, and regard it as certainly in conflict with the English authorities cited above.(*p*)

The reason why the protest and notice should be that of the place of payment is obvious, because it is there that the note is refused payment, or dishonored. No one insists that there should be more than one protest, and that should of course be in accordance with the requirements of the law of the place where the notary is called upon to act. That officer cannot be expected to act except in accordance with his own laws. He cannot be presumed or required to know foreign law, and if one indorser is entitled to require a compliance with the law of the place of indorsement, all indorsers are equally entitled. By this rule, it would seem that protest might be required to be made in one of these States in accordance with the law of every other State in the Union; but no notary could comply with such

(*n*) So held in Bowen *v.* Newell, 3 Kern. 290. As to days of grace, see remarks of Mr. Justice *Martin*, in Vidal *v.* Thompson, 11 Mart. La. 23, 24. A few countries in Europe (e. g. Russia, and, until of late, some of the Swiss Cantons) still use the Old Style. If a bill be drawn in a country using the Old Style upon one where the New obtains, or *vice versa*, a question arises according to which style computation shall be made. If the time is to be reckoned from the date, the style of the place where the bill is drawn must prevail; but otherwise, the style of the place on which the bill is drawn, and where it is payable. In the case first supposed, the date must be reduced to the style of the place where payable, and the time reckoned from that. Chitty on Bills, 8th ed., 169. This, of course, supposes the time of payment to be according to the law of the place where payable. Mr. Kyd (on Bills, 8) says this is contrary to the reason and the nature of the thing; but the reverse is maintained by high authorities. Poth., Pl. 155, notes to Poth. by Hutteau, p. 241.

(*o*) Crawford *v.* Branch Bank at Mobile, 6 Ala. 12.

(*p*) See *supra*, p. 339, note *j*.

a requisition. The principal reason urged for such a rule is, that every indorsement is a new contract; for, as we have repeatedly said in previous chapters, every indorsement on a bill is like drawing a new bill, and every indorsement on a note is like making a new bill or note. The liabilities of all these parties rest upon certain conditions with regard to demand and notice. If we suppose that drawing a bill makes the drawer liable if demand and notice are made and given according to the law of the place of payment, and if indorsing is regarded as a new drawing, it is still drawing a bill on the drawee, who all the time resides at the same place. This very reasoning might then lead to the conclusion, that the law of the place of payment alone ought to be complied with, in order to bind both indorser and drawer. In the New York case, the law of France, which was insisted upon, required more than was required by the law of New York; but in a subsequent case it was held in New York that the indorser was entitled to notice of non-acceptance as well as of non-payment, although notice of the former was not requisite by the law of Pennsylvania, where the bill was made payable.(*q*)

Boullenois thinks that protest should be according to the law of the place where the bill is payable. But where a bill is foreign, and has been indorsed in several different countries, he thinks the time of notice and the recourse upon dishonor is governed by the rules of different countries in different cases. A bill is drawn in England on France; the payee is a Frenchman, and indorses it to a Spaniard (in Spain), and he to a Portuguese (in Portugal), and he to the holder. The last is to have recourse against the Portuguese by the law of France, because there the holder is to receive payment. The Portuguese, however, may give notice by his own law, because he only knows that; and so of every other indorser.(*r*)

The place of payment, or, if none be mentioned in a note or bill, the place of making, determines the construction, validity, and obligation of such bill or note. This is the case, even if the maker or drawer resides elsewhere. Days of grace must, as we have seen, be regulated by the law of such place of payment,

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(*q*) Allen *v.* Merchants' Bank of N. Y., 22 Wend. 215, cited *supra*, p. 360, note.

(*r*) 1 Boullenois's Observations, pp. 370 – 372, and 531, 532.

and must be complied with before demand can be made and the indorser fixed.(*s*)

If a negotiable note or bill of exchange be drawn in one of the United States on England, it may be indorsed in another State, and in another still. An indorser may be sued, and it is settled that he is liable for the damages given by the law of his place of indorsement. In Massachusetts, such damages are ten per cent, in New York and Pennsylvania twenty, and in Maryland fifteen per cent.(*t*)

The drawer and the indorsers equally make substantive contracts, and are liable accordingly each for the damages of his place. In this way, an indorser may be liable for a much larger sum than he can recover from the preceding indorser or drawer; but this is certainly voluntary with him, and if the accumulation of exchanges is allowed by the law of the place of contract, the indorser or other party must of course suffer it.

It is sometimes urged that the indorsers would be liable to pay these exchanges at any rate, if they were payable by the law of the place of drawing, just as the drawer would be liable, because they have their remedy over against him.(*u*) But the reasons already given lead us to prefer a different doctrine.

It has been sometimes said, and by high authority, that this rule is a departure, and that the place of payment should govern,(*v*) because that is the place where they agree to pay; but this does not seem to be quite correct, for the primary agreement

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(*s*) See *supra*, p. 344, and note *n*.

(*t*) 3 Kent, Com., § 44, pp. 116 - 120, 3d ed.; Powers *v.* Lynch, 3 Mass. 77; Prentiss *v.* Savage, 13 Mass. 20; Slacum *v.* Pomery, 6 Cranch, 221; Depau *v.* Humphreys, 20 Mart. La. 1; Hicks *v.* Brown, 12 Johns. 142; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Crawford *v.* Branch Bank at Mobile, 6 Ala. 12; Grimshaw *v.* Bender, 6 Mass. 157. We think it makes little difference whether this rule be rested upon the implied assent of parties to the effects and consequences of their contracts as controlled by the *lex loci contractus*, as said by some judges. Blanchard *v.* Russell, 13 Mass. 1; Prentiss *v.* Savage, 13 Mass. 20. Or whether the rule be put upon the ground that the *lex loci* is sovereign, and operates *per se* upon all contracts within its jurisdiction. Potter *v.* Brown, 5 East, 124. See also opinion of Chief Justice *Marshall*, in Ogden *v.* Saunders, 12 Wheat. 332. The distinction is important between cases where the *lex loci contractus* actually extinguishes, annuls, and discharges the contracts, and those in which the remedy alone on such contracts is affected.

(*u*) Pardes. Droit. Com., art. 1500.

(*v*) 2 Kent, Com., § 39, pp. 459, 460; Chitty on Bills, 191, 8th ed.

is, that the drawee shall pay; and if he does not, they are liable, on condition of immediate notice, &c.(*w*)

Thus we see different indorsements may create various and different obligations in different States. To enable an indorsee to recover, it is generally necessary only to make demand and give proper notice; but in some States it seems that, to charge an antecedent indorser, a suit must have been commenced, and prosecuted with effect against the maker, in the country where he resides.

In a case in Massachusetts, a note was before the court, made and indorsed in Illinois, where the law is as we have just stated it; and the indorser was sued by the indorsee. It was held that the law of Illinois must govern.(*x*) The case is somewhat different where a note is made and is payable in one State, and afterwards indorsed in another jurisdiction, where the law is as in Illinois. But we think the reasoning of the case extends to such a note, and it has been so regarded. Where, however, the payee of a promissory note executed and payable in New York, having indorsed it in Indiana, was there sued, it was held that the indorsement was governed by New York law, and that the defendant was liable in the action if he were so by New York law.(*y*) This seems to us to be a correct decision, and we think it would be a better rule if the place of payment should be generally adopted as governing the liability of all parties, except with regard to damages, &c., and whatever may be properly regarded as belonging to remedy, which depends upon the *lex fori*.

But it is said that, if a note is made in one State, and indorsed in another, the maker must be governed by the law of the State in which the note is made, and the indorser by the law of the State in which he indorsed; and so also with guarantors, who are entitled to have the law of their States applied to their contracts.(*z*)

(*w*) Potter *v.* Brown, 5 East, 124; Hicks *v.* Brown, 12 Johns. 142; Powers *v.* Lynch, 3 Mass. 77; Prentiss *v.* Savage, 13 Mass. 20.

(*x*) See *infra*, note *z*.

(*y*) Bissell *v.* Lewis, 4 Mich. 450.

(*z*) See Williams *v.* Wade, 1 Met. 82, 83, per *Shaw*, C. J. In Dow *v.* Rowell, 12 N. H. 49, Dunn *v.* Adams, 1 Ala. 527, Yeatman *v.* Cullen, 5 Blackf. 240, the rule seems to be laid down, that the indorser and the maker as well are entitled to claim their own rules of law. The cases of Russell *v.* Buck, 14 Vt. 147, Allen *v.* Merchants' Bank, 22

But the laws of the different places where an indorsement is made impose as many different modifications upon the indorser's liability as there are different indorsers in different places. In one State an indorser may be by law merely liable as a surety; (*a*) in another, not liable until the holder has exhausted his remedy against the maker; (*b*) and in a third, liable upon non-payment by the maker or acceptor, and proper notice thereof. (*c*) In one very important case, the question of an indorser's liability arose, and it was determined that, although the note was indorsed in Michigan, yet it was so indorsed for the accommodation of the maker, in whose possession it was until it was delivered in New York, and therefore the indorser's responsibility was determined by the law of New York. (*d*)

Wend 215, Reddick *v.* Jones, 6 Ired. 107, hold or imply the same rule with regard to indorsers. In many of the States statutory enactments and a very narrow policy change the responsibility from the general liability of the law merchant.

(*a*) Ingersoll *v.* Long, 4 Dev. & B. 293. By the North Carolina act of 1827, such is the responsibility of indorsers of negotiable paper made and indorsed within that State.

(*b*) Howell *v.* Wilson, 2 Blackf. 418. So in Virginia. Clark *v.* Young, 1 Cranch, 181; Violett *v.* Patton, 5 id. 142; Roberts *v.* Kilpatrick, 5 Stew. & P. 96. It seems that the suit against the maker of a note is dispensed with in Virginia, if he be insolvent. Violett *v.* Patton, 5 Cranch, 142, per *Marshall*, C. J. In Williams *v.* Wade, 1 Met. 82, the law of Illinois, as there stated by *Shaw*, C. J., seems to be that a suit must be brought and prosecuted to judgment against the maker of a promissory note before the indorser is liable. See Slacum *v.* Pomery, 6 Cranch, 221; Powers *v.* Lynch, 3 Mass. 77; Aymar *v.* Sheldon, 12 Wend. 439.

(*c*) Cayuga Co. Bank *v.* Warden, 1 Comst. 413; McDonald *v.* Bailey, 14 Maine, 101; McDonald *v.* Smith, id. 99; Pickard *v.* Valentine, 13 Maine, 412. In Maine, mere notice of non-payment by the maker seems to suffice. In New Hampshire, the notice must state that the indorser is relied upon for payment, unless such notice has been waived or excused Lawrence *v.* Langley, 14 N. H. 70; Leavitt *v.* Simes, 3 N. H. 14. In Vermont, the law is the same, only the notice may be sent by mail to the post-office of the town where the indorser resides, even if he reside nearer another or get his letters from the latter, and waiver of notice is not waiver of demand. Bank of Manchester *v.* Slason, 13 Vt. 334; Buchanan *v.* Marshall, 22 Vt. 561; Spooner *v.* McConnell, 1 McLean, 339; Berkshire Bank *v.* Jones, 6 Mass. 524. If a person not a party writes his name on the back of a note, it is the same as if the name were on the face, and he may be sued as maker; but being in blank, parol evidence may show what obligation was assumed at the time of signing. Sylvester *v.* Downer, 20 Vt. 355.

(*d*) Cook *v.* Litchfield, 5 Selden, 279, 290. From this case appears also the principle, that the accommodation party to a bill or note makes the party to whom he lends his signature his agent for putting the instrument in circulation, and of course his contract must be where he has allowed his agent to make it.

SECTION IX.

OF THE LAW OF PLACE AS APPLICABLE TO INFANTS AND MARRIED WOMEN.

It is true, in general, that what is a discharge of a debt where the contract is made or to be performed, is a valid discharge everywhere.(*e*) It is a general rule, also, of the *jus gentium*, that all questions of minority, competency, incapabilities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, must be determined by the law of the place where the act is done, or the contract made.(*f*) But we do not think that infancy can properly be deemed a discharge of the contract. It may be pleaded in bar, but is no legal discharge, like payment or bankruptcy proceedings.

Infancy, in connection with the law of negotiable paper, seems to present a question which touches the two rules: first, that the *lex loci contractus* determines the legality and force of contracts; and secondly, that the remedy, and therefore the parties to the suit, are to be governed by the law of the forum.

The reasons given for an infant's suing in the name of or by his next friend or guardian, and being sued through his guardian, are, that the processes of court cannot issue against an infant, and also that, if he were plaintiff, he would still not be responsible for costs. And thus infancy seems to affect his *locus standi* in court.

They who are infants in one country may lawfully and validly contract in another, in which they are by law of full age.(*g*) The place of contract must govern. Upon this subject, however, there is much difference of opinion among foreign jurists. Some of them assert that at Modena, where a minor of fourteen years could contract, a minor of Bologna could not do so, although of the same age. But these discussions have very little weight upon common-law tribunals, and do not often aid in the decision of difficult questions.

(*e*) Bartsch *v.* Atwater, 1 Conn. 409.
(*f*) Huey's Appeal, 1 Grant's Cases, 51.
(*g*) Saul *v.* Creditors, 17 Mart. La. 569.

Under the recent statutory regulations, the question must arise, and come under discussion, how far a man is entitled to sue upon choses in action which before marriage belonged to his wife, and to which he became entitled, if at all, by marriage in a foreign jurisdiction. An early Massachusetts case on this subject seems to imply that the courts of Massachusetts would presume the effects of marriage and divorce to be the same in a foreign country as in Massachusetts. But the case is not a very strong one.(*h*)

But it seems to have been generally considered that the question of infancy goes to the validity of a contract, and wherever it is a valid defence by the *lex loci contractus*, it will be so held everywhere.(*i*)

SECTION X.

OF THE LAW OF PLACE AS APPLICABLE TO THE DOMICIL OF PARTIES TO BILLS AND NOTES.

The domicil of the parties sometimes, but not often or necessarily, determines the place of payment of negotiable paper. If no place is specified, it may be demanded of the payor wherever he may be, as we have seen. But as to the law of the note, it would in general be that of the domicil of the party who was to pay; that is, the maker or acceptor.

(*h*) In Legg *v.* Legg, 8 Mass. 99, a question arose how far a marriage in Vermont passed the wife's choses in action to her husband. The court said: "We must presume the laws of Vermont to be similar to ours on this subject, unless the contrary is regularly shown." The case was one growing out of a libel for divorce, and was not a very strong one. The same doctrine was advanced in Harper *v.* Hampton, 1 Harris & J. 687. But there the question was concerning real property.

(*i*) Male *v.* Roberts, 3 Esp. 163. In Thompson *v.* Ketcham, 8 Johns. 189, it was decided that, in an action in the State of New York on a promissory note made in Jamaica, the defendant must show that the plea of infancy which he set up was a good defence in Jamaica also. For "the court cannot know *ex officio* what are the rights and disabilities of infants, or when infancy ceases by the provincial law of Jamaica. . . . . What the foreign law is, must be proved as a matter of fact." This was so ruled by Lord *Eldon* in Male *v.* Roberts, cited *supra*. Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54, 61. But the minor was required to prove that by the laws of the place of contract he was a minor. It has been held in another case, that the foreign law will be presumed to be the same as the law of the forum.

If a place be mentioned in the address of the bill, as is usual, it is the law of this place which governs the contract entered into by acceptance, without reference to the actual residence of the acceptors; for the law presumes the place to be mentioned for this very purpose. In one case, one domiciled in Boston accepted in Manchester, in England, a bill drawn in Manchester by a resident there, payable to himself or bearer in London. This bill, in a suit on the acceptance in Boston, was held to be a bill drawn in Boston on London to all intents and purposes; and it was treated as if the bill had been accepted in Boston.(*j*)

If a note be made at a particular place, or if a place of payment be mentioned in the bill, such place will regulate the validity, construction, and obligation of such bill, as well as the time of payment; and it matters not where the maker or drawer may have his domicil.(*k*)

The domicil of parties entering into the contract is much more considered by the Continental jurists than by the courts of Great Britain or of the United States. But the last seem to regard it more than those of Great Britain, especially with regard to the effect of discharge upon a contract, as by bankruptcy. This subject will be considered in the section on the Law of Place as applicable to the Discharge of Bills and Notes.

In the United States, domicil or citizenship seems to make one very important difference with regard to the law of discharge of contracts, as may be seen by consulting the section on that subject. As between citizens of the same State, a discharge under a State insolvent law is good. But as between one who is a citizen and one who is not, a contract, though made in the State, is not discharged by a State insolvent law.(*l*)

With regard to bills of exchange, there exist some peculiarities as to capacity to contract which are in a measure determined by the domicil of the party in question. In many foreign countries an inability to become a party to a bill of exchange attaches to many persons. The peculiar obligations implied in negotiable instruments seem to be there regarded as being very perilous in their character. And therefore it is only allowed to such per-

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(*j*) See *supra*, p. 339, note *j*.

(*k*) Story, Confl. of Laws, § 264; Bryant *v.* Edson, 8 Vt. 325; Bank of Orange Co. *v* Colby, 12 N. H. 520.

(*l*) See *infra*, p. 364.

sons to enter into this class of contracts as seem from the nature of their employment to find it necessary to their business.

Between countries which so limit capacity, such capacity is determined by domicil.(*m*) But we do not think that either English or American courts would take into consideration a foreigner's capacity, provided he drew, accepted, or indorsed a bill of exchange within the jurisdictions of such courts. We should say, too, that such a person, being incapacitated in his own country, having become a party to a negotiable instrument in England or America, would be held liable also by the courts of his own country, because those courts would merely take into consideration the view which the courts under the jurisdiction of which the act is done would take. But it may in general be stated that the interpretation of a contract is to be by the *lex loci contractus*, and not by the *lex domicilii*.(*n*)

SECTION XI.

OF THE LAW OF PLACE AS APPLICABLE TO THE TRANSFER OF BILLS AND NOTES.

An instrument of the same nature may be in one country transferable in one way only, and in another in a different way. In one country an instrument may be negotiable, in the proper sense of the word, in another non-negotiable, and in yet another not even assignable. An instrument which has been transferred in the place in which it was made, in a way which is valid there, may be sued in another country by the transferee.(*o*) The question may then arise, whether he can maintain an action in his own name, because he could do so in the country in which the

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(*m*) Savigny, Vol. VIII. p. 263; Westlake, Private International Law, art. 348, p. 329, ed. 1858. This incapacity may be regarded as a relic of the prejudice among the Romans against the carrying on of trade by the nobility. This, as is well known, threw the commerce of the Romans into the hands of freedmen of the nobility and patricians. This prohibition of trade by the nobility existed in many, and may still exist in some, European states. There are traces of the same spirit to be found in the English bankrupt and insolvency laws. See Westlake, *ubi supra*. Story's Confl. of Laws, § 104.

(*n*) McDougald *v.* Rutherford, 30 Ala. 253; Walker *v.* Forbes, 31 id. 9.

(*o*) Roosa *v.* Crist, 17 Ill. 450.

transfer was made, when this is not allowed to transferees of that class of instruments by the laws of the forum where the question arises.

Again, an instrument may be transferred in the place where made, in a way not valid there, but valid by our laws, and enabling a transferee in our courts to maintain an action in his own name; has this transfer the same efficacy in our courts as if made here?

The case also arises of an instrument made in one place and transferred in another, in a way valid by the law of the place where the instrument was made, but not so by the law of the place where it was transferred.(*p*) In this latter case, we think the law of the forum must to a great extent come in to decide the question.

A similar question arises when an instrument, not transferable by the law of the place where made, is transferred in another place, where such transfer is valid. In this case, also, we should say that the *lex fori* in a great measure determines the question.(*q*)

If a bill is transferred abroad according to the law of the place, the transfer would be good here if such transfer were valid by our law, for then it would be sanctioned by the *lex fori*, if we suppose the question to arise here.(*r*) On general principles,

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(*p*) De la Chaumette *v.* Bank of England, 2 B. & Ad. 385, 9 B. & C. 208.

(*q*) In Milne *v.* Graham, 1 B. & C. 192, a suit was brought on a note made in Scotland, by the indorser against the maker. It was held to be maintainable, because the statute (3 & 4 Anne, ch. 9) contemplated all notes; and it seems to be implied that their negotiability by the *lex loci contractus* would not be regarded. Carr *v* Shaw, Chitty on Bills, 10th Am. ed. 519; Bayley on Bills, 6th ed., p. 28. Bentley *v.* Northouse, 1 Moore & M. 66, overrules Carr *v.* Shaw; London Law Mag., Vol. III. p. 122; Westlake, Internat. Law, 227. In Lodge *v.* Phelps, 1 Johns. Cas 139, 2 Caines, Cas. 321, a note payable to order was given in Connecticut. It was not then negotiable in that State. Being indorsed in New York, and there sued, the indorsee was allowed to recover. The words "or order" in the note certainly showed an intention to make a negotiable instrument. Westlake, *ubi supra*.

(*r*) In Harper *v.* Butler, 2 Pet. 239, it appeared that a debt due from one in Mississippi to one in Kentucky was assigned by the executor of the latter in the latter State, and the assignee sued in Mississippi. *Marshall*, C. J. said: "The assignment in Kentucky could not enable the assignee to sue in the court of Mississippi, unless the law of the court authorized the assignee to sue in his own name." In O'Callaghan *v.* Thomond, 3 Taunt. 82, a case arose in which suit was brought by the assignee of an Irish judgment in England. Such a judgment was assignable by the Irish statute. It was urged, that, by the common law, choses in action were not assignable. The court

it should seem that a transfer illegal and void where it occurs would not be valid anywhere. This would be especially true of a bill, rather than of other instruments not governed by the law merchant; but, perhaps, to make the rule certainly applicable, it should be transferred in the place where made.(*s*) If a note be made at home, and payable at home, or, which is the same thing, payable generally, and also be payable to bearer, it seems that a

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intimated a strong opinion against this view, but finally disposed of the case upon another ground. In Stearns *v.* Burnham, 5 Greenl. 261, the Supreme Court of Maine decided that an executor appointed under the laws of another State could not indorse a promissory note payable to his testator by a citizen of Maine, so as to give the indorsee a right of action in his own name in the Maine courts. This case was more than doubted by Mr. Justice *Story*, in Confl. of Laws, § 359, and then overruled by the same court in Barrett *v.* Barrett, 8 Greenl. 353. The last case commands the assent of Mr. Westlake, p. 228.

(*s*) This question is not without its difficulties. But suppose a note were made in France, which was there not transferable by delivery, but only by indorsement; yet which in England was transferable by delivery alone. Would it be the duty of a French court to hold that a transfer of that note in England passed the property in it to the transferee, because such a transfer was allowed by the English law? Whether there is any contract at all with the transferee seems to us to depend upon the French law under which the contract was made. And this view is not unsupported. In Trimbey *v.* Vignier, 1 Bing. N. C. 151, 4 Moore & S. 695, 6 Car. & P. 25, it was held that, as by the law of France an indorsement in blank does not transfer any property in a bill of exchange, a holder of a bill drawn in France, and there indorsed in blank, cannot recover against the acceptor in the courts of England. We think the reasoning of the court applicable to the case stated above. *Tindal*, C. J. said: "The question, therefore, is, whether the law in France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for in the former case it must be adopted by our courts; in the latter, it may be altogether disregarded, and the suit commenced in the name of the present plaintiff. And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow if the plaintiff sues in his own name, or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing. We therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon these contracts in the courts of the country where such contracts were made, and that such being the case there, we must hold in our courts that he can have no right of suing here." In United States Bank *v.* Donnally, 8 Pet. 372, Judge *Story* said: "An instrument may be negotiable in one State, which yet may be incapable of negotiability by the laws of another State, and the remedy must be in the courts of the latter on such instrument according to its own laws." This would imply that negotiability

transfer by delivery abroad would pass the property in the view of the law at home, because, the note being payable at home, the home law must determine the point. But the question is not without its difficulty, and we think the influence of the law of the forum might make much difference whether it were sued at home or in another country.

We think that, wherever a note is sued by a transferee, he

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depended upon the *forum*, but we do not think this is correct, nor does it conform to the view in the English case. We think that a transfer, when good where made, may be binding so far as the parties *to it* are concerned, but no further. In Folliott *v.* Ogden, 1 H. Bl. 123, Lord *Loughborough*, on the ground that the form of the action must depend on the law of the forum, held, in the case of a bond made in another State, where it was assignable and assigned, that the assignee could not sue upon it in his own name. Here certainly the transfer was according to the laws of the place where made. In England, the question was once raised, whether a note made abroad and indorsed could be sued in England by the assignee by indorsement. The note in question was made in Scotland, but was probably indorsed in England, although this does not appear clearly in the report. Story, Confl. of Laws, § 173, note. It was contended that the statute of Anne 3 & 4, ch. 9, only placed inland notes on the ground with bills of exchange. The court overruled the objection, however, and allowed the indorser to maintain his action, — Milne *v.* Graham, 1 B. & C. 192, — on the ground that all notes were within the statute. See Selw. N. P. 577, referred to by Mr. Chitty in this case. It does not appear distinctly whether the note in Milne *v.* Graham was made in England or Scotland. But probably in the latter. Story on Bills, § 171, note 1. In Carr *v.* Shaw, B. R. Hil. 39 Geo. III., cited Bayley on Bills, p. 22 (Phil. & Sew. ed., 1836), Chitty on Bills, 10th Am. ed. 519, a note was declared on as made at Philadelphia. The court, on demurrer, intimated an opinion that the statute did not apply to foreign notes. But on general issue, Lord *Kenyon* said, that the note, though not within the statute, would be evidence in support of the money bounty. The pleadings are entered as of Mich. T. 39 Geo. III., Roll. 1238. This would not be regarded now. Pollard *v.* Herries, 3 Bos. & P. 335. In this case the notes were made at Paris. Splitgerber *v.* Kohn, 1 Stark. 125, cited in Westlake, Priv. Internat. Law, 227. In De la Chaumette *v.* Bank of England, 9 B. & C. 208, 2 B. & Ad. 385, the *quære* is thrown out by Lord *Tenterden*, who carefully refrains from giving any opinion, whether the property in a promissory note made in England, and payable to order or bearer, is transferable by indorsement or delivery in a foreign country. "If a note of this description," says the Lord Chief Justice, "is not transferable abroad, it may be (I do not say it is) the law that the person who takes it, although the transaction be clearly *bona fide*, cannot recover. . . . . It is a question of law of very great importance, and upon which I should be exceedingly unwilling to give an opinion without hearing the question very fully discussed, and giving it very great consideration. On the one hand, we are to take care that we do not prevent the circulation of the Bank of England notes in foreign countries. It would be very inconvenient to merchants and travellers if we should do that. But on the other hand, we must not shut our eyes against existing facts that come to our knowledge." In the same case, which came up afterwards, it was decided that the notes payable to bearer were transferable in a foreign country. 2 B. & Ad. 385; Trimbey *v.* Vignier, 1 Bing. N. C. 151; Milne *v.* Graham, 1 B. & C. 192.

should not be allowed greater rights against the maker of a negotiable instrument than are given by the *lex loci contractus*, which of course the maker had in mind.

It is not possible to give definite answers, on authority, to all these questions; but the general principle which governs the contract by the law of the country where made, and the remedy by the law of the place where the remedy is sought, will solve most of the difficulties.

However the *lex fori* may limit the remedies of transferees, it should never enlarge them.(*t*) And, in accordance with this principle, the Supreme Court of the United States have held that the law of Mississippi, which permitted the maker as against an indorsee to avail himself of all defences he could have made against the payee before notice of the indorsement, applied to a note payable in Mississippi and indorsed there, although the action was brought in another State, where the law was otherwise.(*u*)

It has been decided, as we have seen, and as we think correctly, (and the rule may serve to answer some of the questions stated above,) that if a bill or note be made abroad, and there transferred in a way which is valid by our laws, but invalid by the law of the country in which it takes place, a suit cannot be maintained upon it by such transferee in our courts. But, again, the opposite has also been held in some of the States.(*v*) And it has been said and held that an instrument may be negotiable in one State, and not capable of negotiation in another, and that the remedy in the courts of the latter on such an instrument must be according to its own laws.(*w*)

(*t*) In Talleyrand *v.* Boulanger, 3 Ves. Jr. 447, the Lord Chancellor declared that he considered it as contrary to all principles which guide the courts of one country in deciding upon contracts made in another, to give greater effect to the contract than it would have by the laws of the country where it was made. If an obligation be not assignable in its inception, it is clear that no attempt to assign it to which the debtor is not party should give title against him. Even a public assignment by a bankrupt law will not enable the assignee to sue upon it where choses are only assignable in the creditor's name. Jeffery *v.* M'Taggart, 6 Maule & S. 126.

(*u*) Brabston *v.* Gibson, 9 How. 263.

(*v*) Lodge *v.* Phelps, 2 Caines, Cas. 321, 1 Johns. Cas. 139. The indorsee of a promissory note given and transferred in Connecticut, where such transfer was illegal, was allowed under the general law merchant and law of New York to maintain his action.

(*w*) United States Bank *v.* Donnally, 8 Pet. 361; M'Rae *v.* Mattoon, 10 Pick.

The reverse of this last decision has also been held in many of the States, and is supported by some authorities of weight.(*x*) The question is, admitting that rights depend on the *lex loci contractus*, and remedies on the *lex fori*, whether "Who shall be plaintiff?" is a matter of right, or only of remedy and form of action. It is urged, that the assignment vests a legal interest and a right of action; that the law of the forum will not deny an action to any party who has certainly a right of action.

The doctrine of the courts of England with regard to choses in action is, that, independently of statutory provisions, they are incapable of transfer. And on this ground it has been held in those courts, that, although they have been properly transferred in a country the law whereof permitted the transfer, they are

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49. In this case a *quære* is thrown out; but the opinion of the court seems to be, that a bond, though assignable and assigned, must be sued in Massachusetts in the name of the obligee only. Pierce *v.* Read, 2 N. H. 359; Wilkinson *v.* Wright, 1 Taylor, 227; Craig *v.* Craig, 1 Call, 483. In the opinion in 9 Am. Jur. 42, one difficulty is suggested. If a negotiable note be indorsed in Massachusetts, the indorsee has no authority to sue in the payee's name, without his consent. Mosher *v.* Allen, 16 Mass. 451. Then, if such a note were sued in a forum where non-negotiable, the indorsee could sue neither in his own name nor in the name of the assignor.

(*x*) See opinion in 9 Am. Jur. 42, signed T. M. (Theron Metcalf?). In Stuart *v.* Greenleaf, 3 Day, 311, a promissory note was made and indorsed in the State of New York, and sued by the indorsee in the State of Connecticut, where such note was not then negotiable. Yet such an indorsee was allowed to maintain a suit against the maker. In this case, however, the objection was not taken, and, as Mr. Chitty remarks, (Bentley *v.* Northouse, Moody & M. 66,) such cases are of little weight. There seems to be some authority for this in the English decisions. O'Callaghan *v.* Thomond, 3 Taunt. 82, where some assigned Irish bonds were sued in the names of the assignees in England. They were assignable by Irish statutes (9 Geo. II. ch. 5, 25 Geo. II. ch. 14), which were made a part of the record. In Owen *v.* Moody, 29 Missis. 83, these were the circumstances of the case. A note, non-negotiable by the law of Mississippi, which was the forum, was made in Kentucky, and there transferred, and the transferee was allowed to bring an action in his own name in the Mississippi court, as he could have done in Kentucky. It was put upon general grounds, and also upon this basis, — that "It is a principle of universal recognition, that a title to personal property duly acquired under the *lex loci rei sitæ* will be deemed valid and be recognized as a valid and lawful and perfect title in every other country. . . . . This principle is entirely applicable to the case at bar. For negotiable securities, and the note in question was negotiable under the statute law of Kentucky, are regarded somewhat in the light of chattels personal rather than as choses in action, the absolute legal title to which vests in the indorsee." See M'Neilage *v.* Holloway, 1 B. & Ald. 218. But see Richards *v.* Richards, 2 B. & Ad. 447; Innes *v.* Dunlop, 8 T. R. 595. See Westlake on Private International Law, p. 225.

nevertheless not recoverable in England in an action brought in the name of the transferee.(*y*)

A corporation, existing within and by the laws of one country, may maintain an action in another country; (*z*) and so may a foreign nation or sovereign.(*a*)

If a transfer of a note or bill be made in a country different from that in which the negotiable paper is made, by the law of the first, equitable defences may be allowed, and by the law of the other, excluded; and then the question would arise, Which rule is to govern in a suit against a holder by a transferee? The law seems to be, that the defences of the *locus contractus* are to govern, and that subsequent negotiation does not change original duty, rights, or obligation.(*b*)

Where there is any conflict as to the proper form of assignment, or its substantial validity, as between original creditor and assignee, the law of the place of assignment should govern, and this imposes no hardship.(*c*) In quite a late case it has been

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(*y*) In Folliott *v.* Ogden, 1 H. Bl. 123, Lord *Loughborough* decided that a bond made in another state, and there assignable and assigned, must be sued in the obligee's name in England. Pearsall *v.* Dwight, 2 Mass. 86; Meredith *v.* Duval, 1 Munf. 76. In Wolff *v.* Oxholm, 6 Maule & S. 92, the Court of the King's Bench decided that the assignee of a debt in Denmark, where the assignee might sue upon it in his own name, could not so sue in England. See Jeffery *v.* M'Taggart, 6 Maule & S. 126; Innes *v.* Dunlop, 8 T. R. 595. The rule established in the English courts is censured by Mr. Justice *Story*, in his work on Bills, § 173, where he says the *lex loci contractus* ought to govern in determining with whom the contract is made. But see Alivon *v.* Furnival, 1 Cromp. M. & R. 277, 296, and Story, Confl. of Laws, §§ 353, *a*, 565, 566. A note payable to A. B. or bearer can only be transferred in Illinois by indorsement, so as to vest a title in the holder. In Roosa *v.* Crist, 17 Ill. 450, the note sued upon was dated "3d Jan. 1844. Bethel, N. Y." It was transferred in New York before it fell due. It was argued that a transfer good in New York should be valid everywhere, for the law of the place must fix and control the status everywhere. But it was held that, because a right was enforceable by the assignee in his own name in New York, it was not a sequence that it was so in Illinois; because our laws do not require "or order" to make a note negotiable, "it would not follow that the assignee could enforce it in his own name in a State by whose law no such transfer could be made." *Skinner*, J. dissented.

(*z*) Henriques *v.* Dutch W. I. Co, 2 Ld. Raym. 1532, 1 Stra. 612; Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Society for Propagation of the Gospel, &c. *v.* Wheeler, 2 Gallis. 105; Bank of Marietta *v.* Pindall, 2 Rand. 465; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91.

(*a*) Nabob of Arcot *v.* East India Co., 4 Brown, Ch. 180; Eagle Bank at New Haven *v.* Chapin, 3 Pick. 180.

(*b*) Ory *v.* Winter, 16 Mart. La. 277.

(*c*) In Barney *v.* Newcomb, 9 Cush. 46, a bill of exchange was drawn in New York

held that the place upon which the bill of exchange is drawn may vary the rights of the drawer, and may affect the validity of a transfer. Therefore, where a bill of exchange was drawn in New Granada upon New York, and indorsed in New Grenada in a way not valid by the laws of that place, but entirely so by the law of New York, it was held, that as between the drawer and indorsee, the New York law must apply, and the drawer was held liable to the indorsee. It would seem, however, that the indorser should not have been held liable.(*d*)

SECTION XII.

OF THE LAW OF PLACE AS APPLICABLE TO THE DISCHARGE OF BILLS AND NOTES.

It is a general rule, say the English courts, that a discharge good by the laws of the country or place where the contract was made or is to be performed, is to be held of equal validity and force in every other place where the question may arise and be litigated.(*e*) The reason of the rule rests upon the operation of the *lex loci* upon all contracts, and this law may be well supposed

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on Massachusetts, in pursuance of a written promise to accept, or authority to draw. The bill was purchased in New York by a banker, and made payable to his cashier. The suit in Massachusetts was decided as stated in the text; the question whether the agreement was negotiable was determined by Massachusetts laws, and the New York banking law was referred to, to show that the defendant's promise could be sued upon by the banker in his own name. See Westlake, Private Internat. Law, 226.

(*d*) Everett *v.* Vendryes, 19 N. Y. 436.

(*e*) Bartsch *v.* Atwater, 1 Conn. 409. "It is a general principle," said Lord *Mansfield*, "that where there is a discharge by the law of one country, it will be a discharge in another." Ballantine *v.* Golding, 1 Cook. Bank. Laws, p. 347, 5th ed., p. 515, 4th ed., cited in Pedder *v.* Mac Master, 8 T. R. 609; Blanchard *v.* Russell, 13 Mass. 1; Potter *v.* Brown, 5 East, 124; per Lord *Ellenborough*, Hunter *v.* Potts, 4 T. R. 182; Quin *v.* Keefe, 2 H. Bl. 553; Smith *v.* Smith, 2 Johns. 235; Hicks *v.* Brown, 12 id. 142; Watson *v* Bourne, 10 Mass. 337; Green *v.* Sarmiento, Pet. C. C. 74; Reimsdyk *v.* Kane, 1 Gallis. 371; Baker *v.* Wheaton, 5 Mass. 509; McMenomy *v.* Murray, 3 Johns. Ch. 435; Walsh *v.* Nourse, 5 Binn. 381; Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; Atwater *v.* Townsend, 4 Conn. 47; Hempstead *v.* Reed, 6 Conn 480; Houghton *v.* Page, 2 N. H. 42; Dyer *v.* Hunt, 5 N. H. 401; James *v.* Allen, 1 Dall 188; Millar *v.* Hall, id. 229; Pugh *v.* Bussel, 2 Blackf. 394. But of course such discharge must be a complete one. Ex parte Burton, 1 Atk. 255.

to have the implied or legal assent of all parties. It seems, however, that the jurisprudence of England differs in this respect from that of the continent of Europe, and from the rules laid down in the American cases.(*f*)

It would seem to be universally true, that a discharge in any other country than the one where the contract was made or to be performed will not be binding in any other country.(*g*)

(*f*) Ogden *v.* Saunders, opinion of Mr. Justice *Johnson*, 12 Wheat. 213, 360; Harrison *v.* Sterry, 5 Cranch, 298; Baker *v.* Wheaton, 5 Mass. 509. In both of these latter cases, the English cases are thoroughly reviewed, and without any communication the State and United States courts arrive at the same conclusion. The cases were decided the same month of the same year, and it was held that this country will not recognize the English doctrine that the law of the place of the contract disposes of the rights of the bankrupt. Watson *v.* Bourne, 10 Mass. 337; Topham *v.* Chapman, 3 Const. R. 283. For the recognition of the rule in Pennsylvania, see Phillips *v.* Hunter, 2 H. Bl. 402, in which a British creditor who had recovered of a bankrupt debtor in Pennsylvania was obliged by an English court to refund to the assignees in England as for money had and received to their use.

(*g*) M'Millan *v.* M'Neill, 4 Wheat. 209, overruling Penniman *v.* Meigs, 9 Johns. 325; Lewis *v.* Owen, 4 B. & Ald. 654; Smith *v.* Buchanan, 1 East, 6; Phillips *v.* Allan, 8 B. & C. 477; Van Raugh *v.* Van Arsdaln, 3 Caines, 154. See Ex parte Burton, 1 Atk. 256. In the former case, *Marshall*, C. J. said, it had frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on a contract made in this country. Rose *v.* M'Leod, 4 Stew. & D. 311, overruling Royal Bank of Scotland *v.* Cuthbert, 1 Rose, 462, 486; Quetim *v.* Masson, 1 Knapp, 265, note. In Phillips *v.* Allan, 8 B. & C. 477, it was held that a discharge of an insolvent debtor upon a *cessio bonorum* by the Court of Session in Scotland is no answer to an action brought by an English subject in an English court on a debt contracted in England, although it appeared that the plaintiff opposed the defendant's discharge in the Scotch court. It appears that it would have been held otherwise, had the plaintiff taken the benefit of the Scotch law of distribution. Id. See also Smith *v.* Buchanan, 1 East, 6; Blanchard *v.* Russell, 13 Mass. 1, and cases cited. id. 18, 19. In the former of these cases it was held that an English contract was not discharged by a discharge in bankruptcy obtained in Maryland. Lord *Kenyon* said: "It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that, if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would be bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce, and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended that he is bound by a condition to which he has given no assent, either express or implied?" Frey *v.* Kirk, 4 Gill & J. 509; Green *v.* Sarmiento, Pet. C. C. 74; Le Roy *v.* Crowninshield, 2 Mason, 151; Smith *v.* Smith, 2 Johns. 235; Bradford *v.* Farrand, 13 Mass. 18. Smith *v.* Buchanan, 1 East, 6, decided that an insolvent's discharge in Maryland had no

This rule has its most frequent application in relation to discharges in bankruptcy and insolvency, and the law on this subject is different in different States and countries. As the various States have different laws on this subject, there is much conflict between them on contracts in general, and especially on that which is the most common of all mercantile contracts, that of a promissory note or bill.

As between citizens of the State passing an insolvent law, a discharge by force of such law is certainly binding upon the parties as to all contracts made and debts contracted after the passage of the law,(*h*) but it leaves unaffected such contracts as are made before the act.(*i*)

But a discharge under a foreign bankrupt law is no bar to an action in the courts of any country on a contract there made.(*j*)

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effect upon a debt contracted in England, and the common-law cases have almost uniformly gone upon the same distinction. Ewart *v.* Coulthard, cited in Van Raugh *v.* Van Arsdaln, 3 Caines, 154, 155; Bird *v.* Pierpoint, 1 Johns. 118, per *Spencer*, J.; Watson *v.* Bourne, 10 Mass. 337; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Walsh *v.* Farrand, 13 Mass. 19; Babcock *v.* Weston, 1 Gallis. 168; Harris *v.* Mandeville, 2 Dallas, 256; M'Menomy *v.* Murray, 3 Johns. Ch. 435; Buell *v.* Shethar, cited 3 Day, 82; Smith *v.* Brown, 3 Binn. 201; Walsh *v.* Nourse, 5 id. 381; Vanuxem *v.* Hazlehursts, 1 Southard, 192, per *Kirkpatrick*, C. J.; Rowland *v.* Stevenson, 1 Halst. 149. In Royal Bank of Scotland *v.* Cuthbert, 1 Rose, Cas. Bank. App. 462, the Scotch Court of Sessions went further, and allowed an English certificate of bankruptcy to operate a discharge in Scotland. See M'Kim *v.* Marshall, 1 Harris & J. 101; Harrison *v.* Young, id. 102, note. A discharge under a Scotch sequestration was held in England to bar an English debt, on the ground that it was founded on an act of Parliament of the United Kingdom. Sidaway *v.* Hay, 3 B. & C. 12. See Edwards *v.* Ronald, 1 Knapp, 259.

(*h*) Mather *v.* Bush, 16 Johns. 233; Blanchard *v.* Russell, 13 Mass. 1, 16.

(*i*) Sturges *v.* Crowninshield, 4 Wheat. 122. Roosevelt *v.* Cebra, 17 Johns. 108, exactly supports the doctrine in the text. See also Mather *v.* Bush, 16 Johns 233, which held that a discharge under the New York insolvent act of April 3d, 1811, was valid in relation to all contracts made between citizens of New York subsequent to the passage of that act. But what the effect of such a discharge would be upon a contract made in this State (after the passing of the act) between citizens of another State has not been expressly decided. The court in Mather *v.* Bush held that the insolvent act did not impair the obligation of the contract; and that the discharge was therefore valid, because the contract, having been made between citizens of this State after the passing of the law, "being made under the law, is presumed to be made with reference to it, and the parties are legally conusant of it at the time. The contract in such case is not impaired by the law, for the law is a part of the contract." Blanchard *v.* Russell, 13 Mass. 1.

(*j*) See *supra*, p. 360, note *g*.

In the United States, the subject of bankruptcy and insolvency has presented some very difficult questions of constitutional law. For the Constitution provides that "Congress shall have power, &c. to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States," and also that no State shall pass any "law impairing the obligation of contracts."

It seems to be a rule of law in the United States, that a contract made out of a State, between parties not citizens or inhabitants of that State, cannot be discharged by the insolvent laws of that State.(*k*) In a case in which both promisor and promisee are inhabitants of the same State, there seems not to be much question. Where, however, at the time of making the contract the promisee is an inhabitant of another State, the discharge would not bar an action in any other State upon the same cause, or even in the courts of the same State.(*l*) Nor are courts of any State obliged to give effect to the discharge of a foreign debtor, when under its own laws the creditor has previously acquired a right to proceed against his property within its own territory.

There seems to be no difference made or distinction taken with regard to the parties between whom a contract is made, when we consider the effect of a discharge, whether between citizens, between foreigners, or between a foreigner and a citizen. Neither in America nor in England does the allegiance of the party seem to be considered. But under the clause of the Constitution mentioned above, by which States are forbidden

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(*k*) Sturges *v.* Crowninshield, 4 Wheat. 122, 209. Sherrill *v.* Hopkins, 1 Cowen, 103, overruling Penniman *v.* Meigs, 9 Johns. 325. The latter case went the whole length of deciding that a discharge under the insolvent law of one State is a bar to all suits brought in that State, upon antecedent contracts, wherever made. The suit was on a promissory note made in Connecticut, probably by an inhabitant of that State. The payee, the plaintiff, was an inhabitant of Rhode Island. The insolvent act was held a good defence in New York. This would be impairing the obligation of contracts, and precisely the doctrine of the text is held in M'Millan *v.* M'Neill, 4 Wheat. 209. In this case the parties to the contract were inhabitants of South Carolina. M'Millan, the debtor, moved to Louisiana, where he took the benefit of the insolvent law. This was held no defence to the action on the South Carolina contract. See also Peck *v.* Hibbard, 26 Vt. 698. A statute of the United States may give unusual effect to a discharge, without regard to the place where the contract was made. Murray *v.* De Rottenham, 6 Johns. Ch. 52; Harrison *v.* Sterry, 5 Cranch, 289.

(*l*) See *supra*, p. 325, note *v*.

to pass laws impairing the obligation of contracts, it has been decided that a discharge under the insolvent law of the State where a contract was made will not operate as a discharge of a contract made between a citizen of the particular State passing such an insolvent law, and the citizen of another State.(*m*) But it must be recollected that this is international law of the States, and does not affect the law as between the United States and foreign nations.

Although it cannot be doubted that a discharge good in the country of the contract, and especially between citizens of that country, is valid everywhere, yet this doctrine is carried much further by the English courts (*n*) than by those of the United States.

By English cases already cited in the notes to this section, it is maintained as a principle of universal law, that the assignment

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(*m*) Ogden *v.* Saunders, 12 Wheat. 213, 358; Boyle *v.* Zacharie, 6 Pet. 348. In Ogden *v.* Saunders, 12 Wheat. 358, which is the leading case upon this subject, and was remarkable for the ability of the counsel engaged as well as the learned opinions of the judges, the following propositions were maintained with much dissent, each having the consent of a bare majority of the court: — 1st. That the power given to the United States was not exclusive. 2d. That a fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *a fortiori* of posterior contracts. 3d. But when, in the exercise of that power, the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States. Per Mr. Justice *Johnson*. In Gardner *v.* Lee's Bank, 11 Barb. 558, the same rule of law was held. So also in Fiske *v.* Foster, 10 Met. 597, a bill of exchange was drawn in Maine upon the defendant in favor of the plaintiff. The acceptor was discharged under the insolvent laws of the State of Massachusetts. But this was held no bar to an action by the payee upon the acceptance, and the latter was allowed to recover. Clay *v.* Smith, 3 Pet. 411. This last cited case is of very great importance, having decided that, if a creditor makes himself a party to proceedings against his debtor in another State, all further suits will be barred by the discharge of the debtor in insolvency.

(*n*) The suit may not be brought in the forum of the discharging law; and this point is considered in the cases of Smith *v.* Buchanan, 1 East, 6; Lewis *v.* Owen, 4 B. & Ald. 654; Phillips *v.* Allan, 8 B. & C. 477; Ex parte Burton, 1 Atk. 255; Rose *v.* M'Leod, 4 Shaw & D. 311. See Royal Bank of Scotland *v.* Cuthbert, 1 Rose, 462, 486; Sidaway *v.* Hay, 3 B. & C. 12; Edwards *v.* Ronald, 1 Knapp, 259. There is another point which is similar to this, viz. what debts the bankruptcy law is to be supposed even in its own forum to discharge. Mr. Justice *Story* seems to consider it *prima facie* applicable only to such debts as are contracted under it. Confl. of Laws, 348. If more is attempted, even a *res adjudicata* has no authority. Sidaway *v.* Hay,

of a bankrupt's effects at the place of contract should carry his interest in his debts wherever his debtor may reside, and that no foreign discharge of a debtor should operate against debts contracted with a bankrupt in his own country.

In the United States the doctrine is different. The power to discharge the bankrupt rests upon the same ground as the power to assign his debts. It is now held in America that a creditor in this country may attach the British debtor's goods situated here, if the assignee under the foreign insolvency law has not previously taken actual possession of them, and the discharge at the place of contract is no bar to recovery.(*o*) In Massachusetts it has been held that a certificate of discharge under the insolvent laws of that State is a bar to an action on a contract made with a citizen of another State, although the latter has not proved his claim under these laws, if the contract was by its express terms to be performed in that State.(*p*) But this distinction is generally repudiated.(*q*)

The rule that a discharge or cancellation of a contract good by the *lex loci contractus* is good everywhere, includes discharges made by payment, or tender and refusal, whether regarded as a full discharge, or as a fulfilment of the contract. Such payment made by that which is a legal tender of the country is everywhere valid, so that a Russian contract might have been discharged in paper roubles, where they passed by law as specie, and the party to whom they were offered have no right to complain.(*r*) The

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carries the *prima facie* effect of the law much further; so Edwards *v.* Ronald, both cited *supra*. The weight of authority seems to favor the widest extension of the meaning of the act. Murray *v.* De Rottenham, 6 Johns. Ch. 52; Marsh *v.* Putnam, 3 Gray, 551; Journeay *v.* Gardner, 11 Cush. 355; Le Fevre *v.* Sullivan, 10 Moore, P. C. 1.

(*o*) Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 257.

(*p*) Scribner *v.* Fisher, 2 Gray, 43, *Metcalf*, J. dissenting. This case was affirmed in Burrall *v.* Rice, 5 Gray, 539; Capron *v.* Johnson, id. note. This exception to the general rule, however, only applies when the contract is expressly made payable in the State under the laws of which the defendant claims a discharge. Dinsmore *v.* Bradley, 5 Gray, 487; Houghton *v.* Maynard, id. 552.

(*q*) Donnelly *v.* Corbett, 3 Seld. 500; Poe *v.* Duck, 5 Md. 1; Anderson *v* Wheeler, 25 Conn. 603; Felch *v.* Bugbee, Maine, 1860, 9 Am. Law Reg. 104; Demeritt *v.* Exchange Bank, U. S. C. C. Mass., 1857, 20 Law Reporter, 606. Hale *v.* Baldwin, 24 id. 270. But see Brown *v.* Collins, 41 N. H. 405; Whitney *v.* Whiting, 35 id. 457.

(*r*) Anonymous, 1 Brown, Ch. 376; Warder *v.* Arell, 2 Wash. Va. 282, 295; Searight *v.* Calbraith, 4 Dallas, 325; Bartsch *v.* Atwater, 1 Conn. 409; Vt State Bank *v.* Porter, 5 Day, 316. A tender and refusal, if good in the country where the contract

same would be true of Bank of England notes, if a legal tender in England; and in those States (Maine, Vermont, and Massachusetts,—*vide* chapter on Payment) where a promissory note is presumed to be given in payment of a precedent debt, if a note were given in another State, where it was regarded as only conditional payment by the law of that State, it will be so held by the courts of either of those three States also.(*s*)

There is one case which seems to involve great hardship, and to constitute an unnecessary exception to the rule. Where a debt was contracted between two Danes, one of whom was domiciled in England, and afterwards, during the war, the debtor returned to Denmark, the debt was confiscated there, and the debtor made to pay it to the government; and the creditor afterwards sued it in the Court of King's Bench, in England, after the peace, and he was allowed to recover, although by the Danish law the debt was discharged.(*t*) The ground was said to be, that the confiscation was against the law of nations.

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is made or to be performed, even if they there produce a forfeiture of the debt, are good everywhere. So payment in the legal tender of a country is good everywhere. In Warder *v.* Arell, 2 Wash. Va. 282, 295, a tender and refusal which caused forfeiture by the *lex loci* when made were held to do so everywhere. In England, in Anonymous, 1 Brown, Ch. 376, a South Carolina contract paid in paper money there was held a payment in England, though the paper depreciated. In Searight *v.* Calbraith, 4 Dallas, 325, a tender of assignats in France upon a contract there made was held good and lawful in Pennsylvania, as it was authorized by the law of France.

(*s*) Bartsch *v.* Atwater, 1 Conn. 409; Vaneleef *v.* Therasson, 3 Pick. 12. In this case the circumstances were these. A merchant in New York sold goods to the defendants, and took a negotiable note in payment of the price, and gave a receipt in full. *Parker*, C. J. said: "The contract having been made in New York, with reference to their laws, it is to have the same effect here as it would have there, and it is manifest, from a series of cases in the Reports of that State, that the note being lost cannot be viewed as an extinguishment of the antecedent debt, unless it were so expressly agreed (*quære*, — see chapter on Payment by Bill or Note), and that the receipt given by the plaintiff does not amount to such an agreement. Burdick *v.* Green, 15 Johns. 247; Tobey *v.* Barber, 5 id. 68." So where libellants took a promissory note for materials furnished a ship in New York, it was held to be governed by the *lex loci*, and the note was only conditional payment. The Bark Chusan, 2 Story, 455.

(*t*) Wolff *v.* Oxholm, 6 Maule & S. 92.

SECTION XIII.

OF THE LAW OF PLACE AS APPLICABLE TO THE REMEDIES BY ACTION ON BILLS AND NOTES.

It is a general principle of the law of place, that a plaintiff can only claim remedies in any court which that court habitually furnishes to all.(*w*) Being properly organized, the forum proceeds according to its own laws.(*x*) It is not to be expected that a court will afford a foreigner a remedy that it denies to the citizens of its own jurisdiction.(*y*) Moreover, were a court disposed to entertain any forms of action according to the character impressed upon the contract in the foreign country where it was made or was to be performed, its time would be wasted in inquiries with regard to those forms; and it is generally true, that in the courts of almost every country those having rights have some means of enforcing them, and those who have been wronged may have redress, because all courts protect the rights of all who are suitors before them. It is, indeed, at least doubtful whether an agreement between two foreign parties, that their contract should be enforced only in their own courts, even if this agreement made a part of the contract, would suffice to oust courts of other countries of their jurisdiction.(*z*) But it must

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(*w*) "The remedies are to be governed by the laws of the country where the suit is brought, or, as it is compendiously expressed, by the *lex fori*." Per *Story*, J., Bank of U. S. *v.* Donnally, 8 Pet. 372. The rule with regard to remedies is well illustrated in the case of instruments which are specialties *when* made, but cannot be sued on as such unless also recognized as such by the *lex fori*. U. S. Bank *v.* Donnally, 8 Pet. 373. In Warren *v.* Lynch, 5 Johns. 239, a note was made in Virginia, payable in New York, and after the name was a scrawl, which is a seal by the law of Virginia. It was held that *assumpsit*, and *not debt*, was the proper action in a New York court. Andrews *v.* Herriot, 4 Cowen, 508; Trasher *v.* Everhart, 3 Gill. & J. 234. "Quotiescunque circa *judicii ordinationem* controvertitur. Statuta Loci Judici omnibus cæteris posthabitis introspiciantur. In *modo procedendi* consuetudo judicii attendenda ubi lis agitatur; in modo vero decidendi seu in ipsa causæ decisione consuetudo litigantium seu ubi actus est gestus attendendus." Strykius, Dissert. Jurid. Vol. II p. 29. De Jure Principis extra territ. cap. 3, note 34. See *supra*, p. 326, note *y*.

(*x*) Bank of North America *v.* M'Call, 4 Binn. 371.

(*y*) The remedy determines the action to be brought, and the parties in whose names it shall be brought. The foreigner must take the law *as he finds it*. De la Vega *v.* Vianna, 1 B. & Ad. 284, per Lord *Tenterden*.

(*z*) Andrews *v.* Herriot, 4 Cowen, 503. But it was once so held. Gienar *v.* Meyer,

not be asked of any court, that it will proceed in an unusual or unaccustomed way, importing a new form from another jurisprudence, in order to give a foreigner what it does not afford its own citizens.(*a*) And generally, moreover, it is immaterial to the creditor under what form of action his claim is enforced.

It is not to be denied, that, notwithstanding the nice legal distinction between rights and remedies, in many cases where the remedy is changed in character or entirely denied, the rights of the parties are practically defeated, and a denial of justice results. This, however, seems to be unavoidable. It ought to be mentioned that this doctrine of *lex loci* extended at one time to the substance of the remedy, although the form was held to be governed by the *lex fori*. The *extent* of it was held to depend upon the place of contract, and where upon a certain French contract no arrest could be made, it was held that the defendant could not in England be held to bail; (*b*) but this is now overruled.(*c*)

The law of the forum, as we have said, governs as to the remedies of a breach of contract, and this applies especially to notes and bills. Therefore, as the statutes of limitation apply only to

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2 H. Bl. 603. The principle of Whittemore *v.* Adams, 2 Cowen, 626, seems to exclude the influence of foreign jurisdiction or laws from our practice.

(*a*) "We must administer justice according to our laws, and the forms prescribed by our legislature." Scoville *v.* Canfield, 14 Johns. 338.

(*b*) Melan *v.* Fitzjames, 1 B. & P. 138; Pedder *v.* MacMaster, 8 T. R. 609; Potter *v.* Brown, 5 East, 124. See Imlay *v.* Ellefsen, 2 East, 453; Talleyrand *v.* Boulanger, 3 Ves. Jr. 447. The Chancellor seemed to think that a court would not give greater effect to the obligation of a contract than it had in the place where made, and so would not allow arrest.

(*c*) De la Vega *v.* Vianna, 1 B. & Ad. 284. Melan *v.* Fitzjames, 1 B & P. 138, was cited, but was overruled, and an arrest allowed, although none is allowed for debt by the law of Portugal, where the debt was contracted, per *Tenterden*, C. J. See Don *v.* Lippmann, 5 Clark & F. 1; Titus *v.* Hobart, 5 Mason, 378; Hinckley *v.* Marceur, 3 Mason, 88; Imlay *v.* Ellefsen, 2 East, 453. In this case Lord Ellenborough doubted the decision in Melan *v.* Fitzjames, 1 B. & P. 141. The same rule of law was followed in Smith *v.* Spinolla, 2 Johns. 198, in which there was a motion made to discharge a Portuguese from arrest under circumstances like Melan *v.* Fitzjames, but this was refused. Peck *v.* Hozier, 14 Johns. 346, in which case it appeared that the defendant had been arrested in Massachusetts, and discharged pursuant to an act for the relief of insolvents. It was held that the defendant was not entitled to be discharged from arrest in New York. The case of Sicard *v.* Whale, 11 Johns. 194, cannot be distinguished by *Thompson*, C. J. from Smith *v.* Spinolla, cited *supra*. See James *v.* Allen, 1 Dallas, 188 This was a case in which a discharge from imprisonment in New Jersey was held to be no bar to a suit on the same demand in Pennsylvania White *v.* Canfield, 7 Johns. 117; Whittemore *v.* Adams, 2 Cowen, 626.

the remedy, and not to the substance of the contract,(*d*) their application might be discussed in connection with remedy; but this subject has excited so much discussion, that we shall allot to it a separate section.

As an example that a court will require the plaintiff to follow its own forms of action, there was a case in Maryland where assumpsit was brought upon an instrument, in form a promissory note signed by two makers, and to each maker's name a scroll was affixed, with the capital letters L. S. in it. This was held to be a specialty in Maryland, and that covenant or debt, and not assumpsit, was the proper action; and evidence that the instrument was made in Virginia, and that there it was not a specialty and assumpsit would lie, was rejected.(*e*) So in an old case in Massachusetts, where a suit was brought by an indorsee of a promissory note payable to A or order, it was objected that, by the law of Connecticut,(*f*) where the note was given, an action could not be maintained by the indorsee in his own name; but the objection was overruled.(*g*)

The law of remedy, as distinct from right and obligation, seems to receive many illustrations from the history of American jurisprudence; and the distinction is peculiarly necessary under the provision of the United States' Constitution, that no State

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(*d*) See section 15 of this chapter.

(*e*) Trasher *v.* Everhart, 3 Gill & J. 234. The converse was held in Andrews *v.* Herriot, 4 Cowen, 508; namely, that covenant would not lie in New York on a contract with a scrawl, and the word "seal," although by the law of the State where made this was a specialty. This case overruled the case of Meredith *v.* Hinsdale, 2 Caines, 362. See very learned note in Andrews *v.* Herriot, 4 Cowen, 508. The opposite has been held, it seems, in some of the States. Watson *v.* Brewster, 1 Barr, 381; Dorsey *v.* Hardesty, 9 Misso. 157.

(*f*) As late as 1815 a statute was passed in Connecticut declaring that all promissory notes duly executed, to the amount of $ 35 or more, should be negotiable. 1 Swift, Dig. 429.

(*g*) This case is stated by counsel in Pearsall *v.* Dwight, 2 Mass. 84. But see Trimbey *v.* Vignier, 1 Bing. N. C. 151, 4 Manle & S. 695. See also Lodge *v.* Phelps, 1 Johns. Cas. 139, 2 Caines, 321, and quoted in Nash *v.* Tupper, 1 Caines, 412, where it was said: "The principle of the *lex loci* shall not affect the form of action, but shall have reference only to the nature and construction of the contracts and its legal effect, not to the mode of enforcing it." See also Page *v.* Cable, cited in Nash *v.* Tupper, *supra*. Folliott *v.* Ogden, 1 H. Bl. 135, decides that the form of the action must be in accordance with our laws. In this case Lord Loughborough held that a bond made in another State, there assignable and there assigned, could not be sued in England in the name of the assignee, but only in that of the obligee. Pearsall'

shall pass a law impairing the obligation of contracts. This distinction, therefore, which is said to exist in the nature of things, is constantly made and taken in argument; and it is held that any modification of remedy may be made which may recommend itself to the wisdom of a nation or state, without impairing the obligation of a contract.(*h*)

A question of some interest and importance arises frequently in the payment of bills and notes with regard to exchange. A contract is made in a country, payable in the currency of that country. Suit is afterwards brought in another country to recover for a breach of contract. It is not unfrequently a question whether the debt should be paid at the legally established rate of exchange, or at the rate of exchange prevailing at the particular time. For instance, the par value of a pound English is $4.44 by statutory enactment of the United States. A pound English, however, is worth $4.80 in American currency.(*i*) Therefore the rate of exchange (on England) on American bills (i. e. those drawn in the United States), when at about par, is nine or ten per cent above the legal or nominal par. It has been held that it is proper to add to the par value the rate of exchange, if above par, or, if the opposite is the case, to deduct it.(*j*) But in a late American case in Pennsylvania it was

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v. Dwight, 2 Mass. 84; Henry *v.* Sargeant, 13 N. H. 321; Martin *v.* Hill, 12 Barb. 631. The general rule is, that the remedy must be pursued according to the laws of the country where the action is brought. Van Reimsdyk *v.* Kane, 1 Gallis. 371; Fenwick *v.* Sears, 1 Cranch, 259; Imlay *v.* Ellefsen, 2 East, 453; Anonymous, 7 Taunt. 244; Smith *v.* Spinolla, 2 Johns. 198; Maule *v.* Murray, 7 T. R. 470; Pedder *v.* MacMaster, 8 id. 609; James *v.* Allen, 1 Dallas, 188; Harris *v.* Mandeville, 2 id. 256; Doran *v.* O'Reilly, 3 Price, 250; Sicard *v.* Whale, 11 Johns. 194; Le Roy *v.* Crowninshield, 1 Mason, 151; Bird *v.* Caritat, 2 Johns. 342. In Decouche *v.* Savetier, 3 Johns. Ch. 190 – 218, Chancellor *Kent* said the course of remedies was a "question of municipal convenience and public utility, which every government has not only a right to consult, but is bound in duty to promote."

(*h*) See cases cited *supra*, p. 364.

(*i*) See *supra*, Vol. I. pp. 663, 664.

(*j*) Scott *v.* Bevan, 2 B. & Ad. 78, per Lord *Tenterden*, who seems to have had much doubt as to what would be the correct rule. It was an action in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island. It was held that the value of the Jamaica currency in England at the time of the judgment was to be the sum recovered. See Earl of Dungannon *v.* Hackett, 1 Eq. Cas. Abr. 288; Ekins *v.* East India Co., 1 P. Wms. 395; Lansdowne *v.* Lansdowne, 2 Bligh, 60; Cockerell *v.* Barber, 16 Ves. 461. In Delegal *v.* Naylor, 7 Bing. 460, certain billettes issued by the government of Peru were detained by defendants, and the plain-

held that, money being the object of the suit, the rate of exchange at the time of the trial should furnish the criterion. In this case the payment was to be made in Turkish piasters, and in all probability in Turkey.(*k*)

The reasonable rule seems to be, to award the plaintiff such an amount as would produce the sum in the place where the plaintiff is entitled to it; and this would give us the real par, and not the nominal par, as a criterion. We think, too, for a similar reason, that the rate of exchange at the time of judgment should be regarded, and not that of the time of trial, nor that of the time when the payment was to be made.(*l*)

With regard to damages, the question of *lex loci contractus* is somewhat interesting. The damages given in any particular country are, certainly, strictly a part and parcel of the remedy. It cannot be said that at the time of making a contract the par-

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tiffs maintained trover. Their value was estimated, and the plaintiffs were decreed to receive such a sum as would produce the sum at which they were valued in a perfectly good bill on Lima.

(*k*) Lee *v.* Wilcocks, 5 S. & R. 48.

(*l*) In Cash *v.* Kennion, 11 Ves. 314, per Lord *Eldon*, this very reasonable rule is stated: "Where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed." Voet ad Pand., Lib. 12, tit. 1, § 25. In Lanusse *v.* Barker, 3 Wheat. 101, 147, the Supreme Court of the United States expressed an opinion, that, where money is advanced for a person in another State, the implied understanding is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. See also Woodhull *v.* Wagner, Baldw. C. C. 296, 302. In Grant *v.* Healey, 3 Sumner, 523, Mr. Justice *Story* said that the object was to discover where the money was intended by the parties to be paid, and then to give such a sum as will pay the debt where it was to be paid, taking into consideration the rate of exchange. Mellish *v.* Simeon, 2 H. Bl. 378; Smith *v.* Shaw, 2 Wash. C. C. 167, 168. To this decision, that the rate of exchange for the time was to afford the rule, Mr. Ingersoll, the learned counsel for the defence, assented. The decision is spoken of as well considered by Mr. Justice *Story*, in Grant *v.* Healey. See, however, Martin *v.* Franklin, 4 Johns. 124; Scofield *v.* Day, 20 Johns. 102; Adams *v.* Cordis, 8 Pick. 260. This last case differs from Grant *v.* Healey, in which Mr. Justice *Story* expresses his disapproval of it. But the case expressly makes an exception of bills of exchange, and then holds that, when a foreign creditor sues his debt in this State, he will recover the par of exchange; and so of a debtor here summoned on a trustee process. Denston *v.* Henderson, 13 Johns. 322. If a bill drawn on Amsterdam in London be dishonored, one who has the bill may draw a new bill on one who has indorsed such a bill in Paris for a sum which, when negotiated in Amsterdam at the current rate of exchange, would produce the amount of the former bill with the costs; or in the same way he may re-draw on the drawer.

ties expected to be driven to the necessity of resorting to any court to enforce rights arising from the contract. Few persons would make contracts which they expected it would be necessary to enforce by the assistance of the courts. But it is the custom of courts to give as damages for a breach of contract interest from the time of such breach; and it is clear that such interest is damages, for, if more or less than the rate given by law be expressed in the note or bill, the damages for a default in the payment thereof will be just the amount allowed by law.(*m*)

A question arises, Which rule of interest shall control; that of the place where the contract is made, or is to be performed and has been broken, or that of the forum where the cause is tried? The justice of the thing would seem to demand that the interest of the country where the contract is broken or to be performed, though given as damages, should control; and this, we think, has been held by the best authorities until shaken by a late important case in England.(*n*)

(*m*) United States Bank *v.* Chapin, 9 Wend. 471; Mechanics' Bank *v.* Minthorne, 19 Johns. 244. In most of the States the rate of interest, if mentioned generally, is declared by law; and then the parties are left free to contract for a larger, if they choose, within certain limits. The first case cited was one in which the interest mentioned was less than that allowed by law, and the interest given as damages was the regular legal rate. Ludwick *v.* Huntzinger, 5 Watts & S. 51.

(*n*) Cooper *v.* Waldegrave, 2 Beav. 282; James *v.* Allen, 1 Dallas, 188, per *Shippen*, Pres. In Slacum *v.* Pomery, 6 Cranch, 221, the indorser was said to be liable to the damages of the place of indorsement. Hendricks *v.* Franklin, 4 Johns. 119; Hicks *v.* Brown, 12 id. 142. The interest of the place of performance seems silently to furnish the rule of compensation by way of damages. Story, Confl. of Laws, § 296. In Healy *v.* Gorman, 3 Green, N. J. 328, a note, payable without interest, was made in New York, payable in New Jersey. It was said: "The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this State (New Jersey) tacitly annexes an obligation thenceforth to pay interest, until the debt is liquidated. But the obligation to pay interest was no part of the contract, for if the contract had been performed no interest could have been demanded. . . . . It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event, but left the law to take its course in case of a breach of the contract." In Peck *v.* Mayo, 14 Vt. 33, a promissory note was made in Canada, payable in New York and indorsed in Vermont. The maker and indorser were held liable in damages for the New York rate of interest. In Gibbs *v.* Fremont, 9 Exch. 25, 20 Eng. L & Eq. 555, an action was brought by the indorsees of several bills of exchange, drawn by the defendant in Upper California on the Hon. James Buchanan, Secretary of the United States at Washington. The bills, made payable to F. Huttman, and by him discounted when drawn, were dishonored at Washington, the place on which they were drawn. The question was, whether Washington interest, six per cent, or California interest, twenty-five per cent, should govern. The

But the foreign interest, that is, the interest of the place of payment or performance, must be proved, or the interest of the *lex loci* will be allowed to control.(*o*)

And it must be remembered that, when the cause of action has once ripened into a judgment, the whole sum bears the interest of the forum where such judgment is obtained.(*p*)

In many jurisdictions, in the stead and place of interest, of charges of protest, and all other charges incurred previous to, or at the time of, giving notice of non-acceptance and non-payment, certain damages are given which are a certain percentage of, or bear a fixed proportion to, the dishonored bill.(*q*) Such a rule of course makes a part of both drawers' and indorsers' contracts, so that the rate of interest will be that of the drawing and indorsing.(*r*) This at least we think the sounder rule, although the Supreme Court of Vermont have decided that the indorser was liable in the interest of the place where the note was made payable.(*s*)

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decision of the Exchequer Chamber in 1853 gave the plaintiff California interest. In Curtis *v.* Carpentier, 1 Wash. C. C. 376, the note was given and payable in Gaudaloupe in sugar at a valuation. There no interest is given till judgment, and this rule was held to control. So in Cowqua *v.* Lauderbrun, id. 521. In Jaffray *v.* Dennis, 2 id. 253, Georgia interest was allowed on a Georgia contract; but the law of the State must be shown, or the *lex fori* will be applied. Bushby *v.* Camac, 4 id. 296. Unless, of course, the rate of interest be mentioned in the note and appear legal, in which case the interest need not be proved. Gordon *v.* Phelps, 7 J. J. Marsh. 619. But this rate of interest cannot be carried further than the time of judgment. Wood *v.* Corl, 4 Met. 203, holds, with Dennis *v.* Jaffray, that the law must be shown to be different from the law of the forum. So Swett *v.* Dodge, 4 Smedes & M. 667; Ballingalls *v.* Gloster, 3 East, 481; Bomley *v.* Frazier, 1 Stra. 441; Aymar *v.* Sheldon, 12 Wend. 439; Slacum *v.* Pomery, 6 Cranch, 221; Ogden *v.* Saunders, 12 Wheat. 481.

(*o*) See preceding note.

(*p*) Boyce *v.* Edwards, 4 Pet. 111; Peacock *v.* Banks, 1 Minor, 387; Cooper *v.* Sandford, 4 Yerg. 452.

(*q*) See *ante*, chapter on Protest and Re-exchange, and the statutes of various of the United States. In Graves *v.* Dash, 12 Johns. 17, it was determined by a small majority, that the old New York rule of twenty per cent damages did not include exchange as well as other damages. It would seem that the rule is the same now, if the bill be for foreign money, — when exchange "at the time of demand for payment" will be added, besides ten per cent "upon the principal sum specified in the bill." But if the bill be for or expressed in United States money, the exchange will not be reckoned. See Westlake on Private International Law, art. 236; Price *v.* Page, 24 Misso. 65; Page *v.* Page, id. 595; Bouldin *v.* Page, id. 594.

(*r*) Gibbs *v.* Fremont, 9 Exch. 25.

(*s*) Peck *v.* Mayo, 14 Vt. 33.

In cases where the damages are limited by law, the indorser may have to pay more than he can recover from the drawer or previous indorser.(*t*)

Who shall be parties, is generally a question of remedy, and therefore determined by the *lex fori*,(*u*) and, with other questions of transfer, one arises with regard to administration. The payee of a promissory note dies. The administrator or executor transfers it by indorsement, as he is perfectly well entitled to do in his own State under the letters of administration which he has there taken out. The indorsee then sues the maker in the courts of another State. The question then arises, whether the courts of a State will recognize a transfer made in another State by one who has by the law of such State authority to make a transfer, but has no such authority under the law of the State where suit is brought. On this question irreconcilable opinions have been given.(*v*) Some of the principles which bear upon this subject

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(*t*) In Maryland, the damages on bills drawn on Europe are fixed at fifteen per cent; in Pennsylvania, at twenty. Therefore, an indorser might have to pay in the latter State for a bill of 100 dollars 120 dollars; but would recover of the previous indorser in Maryland only 115 dollars. Story, Confl. of Laws, § 314. See Francis *v.* Rucker, 2 Ambl 672.

(*u*) Kirkland *v.* Lowe, 33 Missis. 423; Story, Confl. of Laws, § 565. At least unless the *lex loci contractus* be sufficiently alleged in the pleadings. Wilson *v.* Clark, 11 Ind. 385, overruling Brackenridge *v.* Baxton, 5 Ind. 501; Raymond *v.* Johnson, 11 Johns. 488, where it was held that a New Jersey assignee could not maintain an action in his own name. Blanc *v.* Drummond, 1 Brock. 62; Dacosta *v.* Davis, 4 N. J. 319; Harker *v.* Brink, id. 333.

(*v*) In Owen *v.* Moody, 29 Missis. 79, the payee of a note made in Kentucky died. The note was non-negotiable in form, but could, by the law of Kentucky, be sued in the indorsee's name. The administrator of the payee indorsed the note, and the holder sued in Mississippi. Two objections were taken; — 1st, that the note was non-negotiable in Mississippi; but this, as we have seen elsewhere, was overruled; 2d, that the administrator had no authority in Mississippi, having no power except by an appointment made in Kentucky. This also was overruled, on the ground that the administrator could have passed property in a chattel in Kentucky, and such property would have been indisputable everywhere, and that notes were much like chattels. The opposite decision has been arrived at in Maine, in Stearns *v.* Burnham, 5 Greenl. 261. *Mellen*, C. J., delivering the opinion of the court, said: "It is clear that the executrix herself could not maintain an action in our courts upon the note. Goodwin *v.* Jones, 3 Mass. 514. . . . . We are, then, led to inquire how an executor or administrator, acting under an authority derived from another State, can, by indorsing a note due from one of our citizens, give to his indorsee a power which he himself does not possess, that is, of successfully suing for and recovering it in our courts. If this can be done, it will be an indirect mode of giving operation in this State to the laws of Massachusetts, as such; or, in other words, to an authority derived directly from laws which are not in

we consider in the sections on Transfer, and on Infancy and Marriage, as affected by the Law of Place.

As to the effect of certain remedies, no regard is to be paid to the law of the place where the contract was made, but entirely to the law of the place where the remedy was sought and obtained. Therefore, although the law of New York makes a recovery against one of two partners who have signed a promissory note a merger of such note, and a bar to any action against the other partner, yet where, on a note signed by A & B, copartners in New York, and there payable, a recovery was had in Louisiana against one of the partners alone, it was held that this was no bar to a recovery against the other partner, in the courts of Mississippi.(*w*)

But where a firm in St. Louis drew bills on New York, one dated at St. Louis and another at Cincinnati, and the New York house, though without funds, accepted, and then brought a suit in St. Louis against one of the partners, although by the law of Missouri the claim was still valid, notwithstanding such judgment against the other partners, yet in the New York court the con-

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force in this State." To the same effect was Thompson *v.* Wilson, 2 N. H. 291. In the case of Owen *v.* Moody, *supra*, the case of Robinson *v.* Crandall, 9 Wend. 425, is quoted as contradicting the case in Maine, as well as that in New Hampshire. But we think it fully supports Goodwin *v.* Jones, 3 Mass. 514, upon which the case of Stearns *v.* Burnham is based. The court, per *Sutherland*, J., expressly says, that "Letters testamentary or of administration granted abroad give no authority to sue here; . . . . . we take no notice of them." In Morrell *v.* Dickey, 1 Johns. Ch. 153; Williams *v.* Storrs, 6 id 353, Chancellor *Kent* considers it well settled that we cannot take notice of foreign letters of administration. See Campbell *v.* Tousey, 7 Cowen, 64, and Huthwaite *v.* Phaire, 1 Man. & G. 159; Rawlinson *v.* Stone, 3 Wilson, 1, 2 Stra. 1260. Mr. Justice Story, Confl. of Laws, § 359, seems to take the same view of the question as that taken in the case of Owen *v.* Moody, and anticipates the reasoning of that case in the remark, that such instruments are more like chattels personal than choses in action. See Cope *v.* Daniel, 9 Dana, 415. In Harper *v.* Butler, 2 Pet. 239. Henry Clay, the executor of James Morrison, deceased, assigned a debt to the plaintiff, who brought an action upon it in Mississippi. The court held that, as an assignee may sue in Mississippi in his own name, an assignment like that mentioned makes a complete title, and letters of administration are not necessary in the latter State to enable such assignee to sue in his own name. We must admit that this case is irreconcilable with the cases in Massachusetts and New Hampshire; for it cannot be contended that such assignee would have taken any title from a stranger in Mississippi, who was not appointed executor by a Mississippi court. See Andrews *v.* Carr, 26 Missis. 577; Trimbey *v.* Vignier, 1 Bing. N. C. 158. There seems little doubt that policy would require a transfer by a foreign executor to be recognized; for it seems inconvenient to require new letters of administration to be taken out in every State where it is necessary to have a transfer recognized.

(*w*) Wiley *v.* Holmes, 28 Misso. 286.

tract was held to be a New York contract, and therefore the judgment against one partner merged the claims against all the others.(*x*)

The law of set-off and the law of tender belong also rather to the remedy than to the substance; and therefore are always regulated by the laws of the State in which the action is brought, and not by that in which the note sued upon was made.(*y*)

It is hardly necessary to state that the law of the forum must control the admissibility of evidence, and not only its admissibility, but its effect.(*z*)

SECTION XIV.

OF THE LAW OF PLACE OF BILLS AND NOTES AS APPLICABLE TO INTEREST AND USURY.

INTEREST, if expressly promised to be paid, is as much a part of the debt as the principal.(*a*) If the legal rate of interest be changed during the time a note is running, we should say that the sum to be paid as interest is that prevailing at the time of making the note; but we do not know that this has been decided.

If a note or bill be drawn, and no place of payment mentioned,

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(*x*) But see Suydam *v.* Barber, 6 Duer, 34, in which a doctrine is laid down which may seem inconsistent with the former case; but we think they may be reconciled by the rule, that what is a judgment, and the effect of it against a party, must be everywhere regarded as a matter of remedy.

(*y*) The courts of Kentucky have held that they will not notice the laws of set-off in another State where the note in suit was made. Bank of Galliopolis *v.* Trimble, 6 B. Mon. 599. But what is a matter of set-off must be determined by the law of the forum. Gibbs *v* Howard, 2 N. H. 296. Mr. Justice *Story* states in his Conflict of Laws, § 332, that if by the law of the place of a contract (even although negotiable) equitable defences are allowed in favor of the maker, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*. Ory *v.* Winter, 16 Mart. La. 277; see also Evans *v.* Gray, 12 id. 475; Chartres *v.* Cairnes, 16 id 1.

(*z*) Blocker *v.* Whittenburg, 12 La. Ann. 410. But in Gantt *v.* Gantt, id. 673, it is said that, if a party offer proof inadmissible under the laws of the forum, and the contract is alleged to have taken place in another State, it must be shown that such proof would be admissible to prove the contract in the State where it is alleged to have taken place.

(*a*) Fake *v.* Eddy, 15 Wend. 76.

the measure of interest will be that of the place of drawing. The reason of the rule in respect to a note is obvious, and would apply equally in an action against the drawer of a bill. But if a bill were drawn in New York on London, and there accepted, and, upon his failure to pay, the acceptor were there sued, it might be said that the acceptor holds the position of the maker of a note, and the place of acceptance is his place of making, and in a suit by the holder against the acceptor, the interest payable by him would be that of the place of acceptance. We are not aware, however, that this distinction has been taken.(*b*)

Loans made in a particular place bear the interest of that place, unless payable elsewhere.(*c*) It is obviously reasonable, and is so said, that the rate established at the place where the advance is made should govern.(*d*) If it be payable at a particular place, the measure of interest will be that of that place; for the law presumes that the parties knew the rate of interest at the place of performance, and intended that this rate should govern.(*e*)

(*b*) This rule is held in Hawley *v.* Sloo, 12 La. Ann. 815, which was an action on a note; and is applied *obiter* to the drawer of a bill.

(*c*) Winthrop *v.* Carleton, 12 Mass. 4; Consequa *v* Willings, Pet. C. C. 225; Andrews *v.* Pond, 13 Pet. 65. In De Wolf *v.* Johnson, 10 Wheat. 367, it was held that a contract for the loan of money, entered into in Rhode Island, is to be governed by the usury laws of that State, though security was agreed to be taken upon lands in Kentucky. See Connor *v.* Bellamont, 2 Atk. 382; Cash *v.* Kennion, 11 Ves. 314; Robinson *v.* Bland, 2 Burr. 1077; Ekins *v.* East India Co., 1 P. Wms. 395; Ranelaugh *v.* Champante, 2 Vern. 395; Fanning *v.* Consequa, 17 Johns. 511, 3 Johns. Ch. 587; Hosford *v.* Nichols, 1 Paige, 220; Houghton *v.* Page, 2 N. H. 42; Peacock *v.* Banks, 1 Minor, 387; Lapiee *v.* Smith, 13 La 91; Thompson *r.* Ketcham, 4 Johns. 285; Buzzell *v.* Snell, 5 Foster, 474; Livermore *r.* Rand, 6 id. 85. See also De Sobry *r.* De Laistre, 2 Harris & J. 193; Smith *v.* Mead, 3 Conn. 253; Foden *r.* Sharp, 4 Johns. 183. In Hill *v.* George, 5 Texas, 87, and Wheeler *r.* Pope, id. 262, it was held necessary, when a note is payable out of the State, to aver the rate of interest, and prove it. See Winthrop *r.* Pepoon, 1 Bay, 468; Lanusse *r.* Barker, 3 Wheat. 101; Kissam *r.* Burrall, Kirby, 326; Gaillard *v.* Ball, 1 Nott & McC. 176. It has been held that, if a contract were to be performed in a place different from that of making, it would bear the interest of the former. Hawley *v.* Sloo, 12 La. Ann. 815; Vinson *v.* Platt, 21 Ga. 135. See *supra*, p. 371, note *n*.

(*d*) See preceding note.

(*e*) Scofield *v.* Day, 20 Johns. 102. Assumpsit on a promissory note, made in Montreal in Lower Canada, payable to the plaintiffs (who resided in England), or to their order with interest till paid in England. The plaintiffs were held entitled to English interest, and not to the rate of interest in Lower Canada. Boyce *v.* Edwards, 4 Pet. 111; Braynard *v.* Marshall, 8 Pick. 194; Burrows *v.* Jemino, 2 Stra. 733; 2 Kent's Com., ch. 39, p. 460, 3d ed; Chapman *v.* Robertson, 6 Paige, 627; Harvey *v.* Archbold, 1 Ryan & M. 184. In Hyde *v.* Goodnow, 3 Comst 266, the notes were

But a bill or note cannot be made payable in a particular place, where the rate of interest is higher than at the place of drawing or making, if this is a mere cover for usury.(*f*)

If nothing is said with regard to the measure of interest, the place on which a bill is drawn or a note made payable must govern.(*g*) This seems to be in accordance with the general rule, that interest is to be paid on contracts according to the law of the place where they are to be performed, and interest expressly or impliedly to be paid; *quo solvenda est pecunia*, as is

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for value received, and were signed in Ohio, but delivered in New York. They were void by the law of Ohio, but it was held that they were New York notes. See Davis *v.* Coleman, 7 Ired. 424; Cook *v.* Litchfield, 5 Sandf. 330; Smith *v.* Smith, 2 Johns. 235; Archer *v.* Dunn, 2 Watts & S. 327. In Austin *v.* Imus, 23 Vt. 286, a farm situated in Vermont, where the vendor lived, was sold, and notes given therefor in New York. They were held to bear Vermont interest, the presumption being that payment was to be there made, the payee residing there, and the property being there situated. In Stewart *v.* Ellice, 2 Paige, 604, the debtor resided in England. It was said: "In the absence of any agreement on the subject, the money is payable where the creditor resides, and the interest is to be computed at the rate allowed by the law of the country where the contract is made or is to be performed." But the residence or domicil alone of the payee does not control the contract. Young *v.* Harris, 14 B. Mon. 556; Pomeroy *v.* Ainsworth, 22 Barb. 118; Cooper *v.* Waldegrave, 2 Beav. 282; Quince *v.* Callender, 1 Desaus. 160. In Scofield *v.* Day, 20 Johns. 102, the circumstances of the case were as follows. The note was made in Lower Canada, payable to the plaintiffs (who resided in England) or to their order, "with interest until paid in England." It was held that the plaintiffs were entitled to the interest of England. Archer *v.* Dunn, 2 Watts & S. 327, 364; Thomas *v.* Beckman, 1 B. Mon. 29. In Thompson *v.* Powles, 2 Sim. 194, which is now unanimously accepted as sound law, it was held that the rate of interest on loans is to be governed by the law of the place where money is to be used or paid, or to which the loan has reference. Hosford *v.* Nichols, 1 Paige, 220. In Don *v.* Lippmann, 5 Clarke & F. 1–12, Lord *Brougham* said: "It appears that in Scotland, — and it is rather singular that it should be so, — where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due." But the same learned authority declared in the same case that, "where acceptance is general, naming no particular place of payment, the place of payment shall be taken to be the place of contracting the debt."

(*f*) De Wolf *v.* Johnson, 10 Wheat. 367, per *Johnson*, J. But a contract which is personal by its terms, and to be performed in another State, if the place of performance be not chosen with any intent to evade the law, is not affected by the usury law of the place of execution. Berrien *v.* Wright, 26 Barb. 208. But statutes against usury which apply only to the remedy can only be enforced in those States where the contract was made. Watriss *v.* Pierce, 32 N. H. 560. In this case the contract was made in Massachusetts, and alleged to be usurious by the statutes of that State. The provision in the statute was, that on recovery a deduction of threefold the interest should be made from the sum found due. This rule was held not enforceable.

(*g*) Mullen *v.* Morris, 2 Barr, 85.

said in the Digest.(*h*) If a note or bill is made in one country, and payable in another, it is now well settled that the parties may express the interest of either as payable; (*i*) an election seems to exist, though otherwise the interest of the place of payment or performance would govern, as in other contracts.(*j*)

If, however, the interest expressed in a bill or note is illegal and usurious both by the law of the place where the note is made and by the law of the place where payable, it seems that the law of the place where the contract is made will govern as to the legal consequences of usury, and the effects imposed by way of penalties.(*k*)

Where a bill is drawn payable in Alabama, but made in New York, not contemplating interest on its face except in default of payment at maturity, the rate of interest will be that of Alabama. If a loan be made in New York, and interest there paid, and payment of both principal and interest be made by a bill on

(*h*) Dig., Lib. 42, Tit. 5, l. 3.

(*i*) Where a note is made in one place and made payable in another, the parties may, if they choose, make the interest that of the former or latter place. See *supra*, p. 337, note *e*. Andrews *v.* Pond, 13 Pet. 65, 78. Whether a contract is usurious depends not on the *rate* of interest, but whether the interest is allowed in either the country where the contract is made or to be performed. Harvey *v.* Archbold, 1 Ryan & M. 184.

(*j*) See *supra*, p. 337, note *e*.

(*k*) Andrews *v.* Pond, 13 Pet. 65, 79. *Taney*, C. J. said: "By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration, and without notice of the usury. The present plaintiff claims the benefit of this provision. But upon the evidence in the case it is very clear that he does not bring himself within it." And on p. 77: "The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover, unless he was a *bona fide* holder, without notice, and had given for it a valuable consideration; while, by the laws of Alabama, he would be entitled to recover the principal amount of the debt, without any interest. . . . . A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases, the agreements were permitted by the *lex loci contractus;* and will even be enforced there, if a party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere." This is also the doctrine laid down in the late case, Mix *v.* Madison Ins. Co., 11 Ind. 117. In the case of De Wolf *v.* Johnson, 10 Wheat. 367, it was held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another State. See Dewar *v.* Span, 3 T. R. 425. The place where a note is made and negotiated must

Alabama, the New York law must be the criterion of usury on such a bill.(*l*)

Where a usurious loan was made between parties in New York, and notes given there, and when due there were given up on a bargain for further time, and new notes payable generally given to the lender personally, who was then in Connecticut, on the new bargain; it was held that the law of Connecticut applied to these new ones; and as by this law the defence of usury could not have been made to the original notes, it could not now be made to these, although the defendant had returned to New York, and the action upon them was brought there. This decision reversed the decree of the Vice-Chancellor. If it were a defence, it was certainly a very strong application of the principle, that a note is the note of the place where made, and to be governed in its obligation by the law of that place; but it was afterwards reversed, and the contract held to be a New York one.(*m*)

In quite an old case, a bond was executed in Ireland for a debt contracted in England. It bore Irish interest, which was held valid, because it constituted a security on lands situated in Ireland. Lord Hardwicke thought it would have been otherwise if the bond had been executed in England, or had been a simple contract debt.(*n*)

If a contract is void in one State, from the taint of usury, it may nevertheless be a valid basis for a new contract in another.(*o*)

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govern with regard to its being usurious or not. Dunscomb *v.* Bunker, 2 Met. 8, per *Shaw*, C. J.; 2 Boullenois, Observ. 46, pp. 477, 478. And if payable in a foreign country, it may bear any rate of interest not exceeding that which is lawful by the laws of that country. Id., 2 Kent, Com., § 39, pp. 460, 461, 3d ed.; Thompson *v.* Ketcham, 4 Johns. 285; Healy *v.* Gorman, 3 Green, N. J. 328. In Berrien *v.* Wright, 26 Barb. 208, upon notes made in New York payable in Florida, eight per cent was allowed to be received, the notes being given for Florida lands. And see *supra*, p. 337, note *e*.

(*l*) Hanrick *v.* Andrews, 9 Port. Ala. 9.

(*m*) Jacks *v.* Nichols, 5 Barb. 38, 3 Sandf. Ch. 313, 1 Seld. 178.

(*n*) Connor *v.* Bellamont, 2 Atk. 382; Stapleton *v.* Conway, 1 Ves. Sr. 427; Dewar *v.* Span, 3 T. R. 425. This is particularly well settled if the parties both reside in England; but this fact cannot be material.

(*o*) Depau *v.* Humphreys, 20 Mart. La. 1. In Jacks *v.* Nichols, *supra*, note *m*, the contract was made in New York, where also the notes were dated, but the latter were delivered in Connecticut, and the decision was finally that the contract must be considered an entire thing, and as having been made in New York. Wright *v.* Wheeler, 1 Camp. 165, note.

It is clear that a law declaring that not more than six per cent shall be reserved as interest on contracts, and that, if more be reserved, the contract shall be void, would not affect contracts in existence before the passage of the law; but such a law would enter into and form a part of any contracts which should be made subsequently, and render them void and null.

It must be remembered, however, that the forfeitures of usury statutes are not enforced except for clear and satisfactory causes, and, so far as the law is penal in its operation, it is very strictly construed.

In a late case which arose on the foreclosure of a mortgage in New York, it appeared that a bond and mortgage on lands in New York were given in England for a loan there made by a deposit of money in London to the credit of the mortgagor. Yet it was held that the English usury law was no bar to the mortgagee in a bill to foreclose.(*p*) It should be remembered with regard to interest and usury, as well as with regard to other liabilities assumed by the parties, that the place of effectual delivery controls the law of the contract between the parties. We have already mentioned this in discussing the peculiarities of bills and notes as to the law of place. Frequently interest is construed to mean that of the place where the contract is made, without regard to the formal act of signing the instrument. This may be illustrated by the case of a note signed by the maker, and indorsed for his accommodation in Detroit. It was sent by him to his agent in New York, and there delivered by the latter for a debt due from the maker. This was held a New York note, and the contract of the indorser was held to be governed by New York law.(*q*)

An interesting case has been recently determined with regard to the question of usury. It appeared that a bill was drawn in Ohio by a citizen of that State, upon a citizen of New York, who accepted the bill, and negotiated it with another citizen of that

(*p*) Chapman *v.* Robertson, 6 Paige, 627. Commonwealth of Kentucky *v.* Bassford, 6 Hill, 526, discusses how far the foreign law affects invalidity pronounced by State statutes. Chapman *v.* Robertson is criticised by Mr. Justice Story, Confl. of Laws, 2d ed., 293 *c*, note 1.

(*q*) Cook *v.* Litchfield, 5 Sandf. 330. In Davis *v.* Coleman, 7 Ired. 424, money was loaned in Georgia; a note made in North Carolina was delivered therefor; Georgia interest was allowed, the place of delivery of the note being regarded the place of the contract. See also Hyde *v.* Goodnow, 3 Comst. 266.

State for a consideration which was then usurious. The indorsee sued the drawer, and the defence of usury was allowed.(*r*)

SECTION XV.

OF THE LAW OF PLACE AS APPLICABLE TO STATUTES OF LIMITATIONS

A STATUTE of limitations is regarded as, in general, affecting only the remedy, and not the right.(*s*) Where parties bring themselves under the jurisdiction of the courts of a state, they must be supposed to submit to the rules established for the limitation of actions, as well as the redress of wrongs; and therefore to the statute of limitations.

By a statute of limitations it is generally provided that a certain class or classes of actions shall not be brought after a certain time. But this denial of remedy does not affect the obligation of contracts in the least,(*t*) so far certainly as future contracts are concerned. Were it so, no statute of limitations could be passed by the various States of the United States, because of the prohibition in the Constitution of the United States against the passing by any State of a law impairing the obligation of contracts. As the statutes of limitations affect only remedy in general, they must be controlled in their application by the *lex fori*. Therefore a note made when the statute of limitations bars recovery on a note after three years, or where it is barred after twenty years, if sued in a State where the limitation is six years, may be sued in either case until six years have elapsed, but not afterwards; (*u*) provided, of course, the statute commenced running when the note was made, and the non-

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(*r*) Davis *v.* Clemson, 6 McLean, 622.

(*s*) Hawkins *v.* Barney, 5 Pet. 457; M'Elmoyle *v.* Cohen, 13 Pet. 312; Richards *v.* Bickley, 13 S. & R. 395; Jones *v.* Hook, 2 Raud. 303; Nash *v.* Tupper, 1 Caines, 402; Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; King *v.* Lane, 7 Misso. 241; Watson *v.* Brewster, 1 Barr, 381; Townsend *v.* Jemison, 9 How. 407; Lincoln *v.* Battelle, 6 Wend. 475; Williams *v.* Preston, 3 J. J. Marsh. 600; Cartier *v.* Page. 8 Vt. 146; Chenot *v.* Lefevre, 3 Gilman, 637; Estes *v.* Kyle, Meigs, 34; Pritchard *v.* Howell, 1 Wisc. 131.

(*t*) Brigham *v.* Bigelow, 12 Met. 268.

(*u*) See the next note.

residence of the parties did not bring them under some exception.

It is said on strong grounds, that, if the defendant remain in the State in which the note would be barred by the statute which gives a less time until the statute applies, this bar is not removed by his subsequent removal into a State which gives a longer time; but the former statute may be pleaded in bar in the latter State. But we think that, according to the best authorities, it is now pretty well settled that the court is only to consult its own statute, and allow it to govern.(*v*) It appears

(*v*) In Pearsall *v.* Dwight, 2 Mass. 84, it was said: "The party claiming the benefit of the note in this case has sued it originally in a court of this State; the law of the State of *New York* will therefore be adopted by the court in deciding on the nature, validity, and construction of this contract. This we are obliged to do by our own laws. So far the obligation of comity extends, but it extends no further. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed exclusively by the laws of this Commonwealth. These are matters not relating to the validity of the contract; and to permit the laws of another State to control the court in its proceedings concerning them would intrench upon the authority of our own laws unnecessarily, and for no principle of common utility. . . . . If the State in which the contract was made had no statute of limitations, then by the *lex loci* the action might there be commenced at any time, and if the plaintiff should afterwards remove to this State, and commence his action in our court, the defendant would be deprived of the benefit of the limitations here in force." In Duplein *v.* De Roven, 2 Vern. 540 (see Raithby's note *o*), which was a case of contract made between two foreigners abroad, the Statute of Limitations of England was allowed to be pleaded. Cited per *Parsons*, C. J., in Pearsall *v.* Dwight, 2 Mass. 84, 90. In Huberus, De Conflictu Legum, Vol. II. Lib. I. tit. 3, p. 558, the case of a court in Friesland, applying their own statute of limitations to a Dutch contract, is mentioned, and it is said: "Ratio hæc est quod prescriptio et executio non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ quæ per se quasi contractum separatumque negotium constituit ad eoque receptum est optima ratione ut in ordinandis judiciis loci consuetudo ubi agitur etsi de negotio alibi celebrato spectetur." De Confl. Leg. 5, 7. Ruggles *v.* Keeler, 3 Johns. 263, decides the same point with the Massachusetts case. *Kent*, C. J. said: "A foreign statute of limitations can no more be pleaded to a suit instituted here, than it can be replied to a plea under our statute. Statutes of limitations are municipal regulations founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode, or extent of the remedy." Williams *v.* Jones, 13 East, 439, per Lord *Ellenborough*; Hubbell *v.* Condrey, 5 Johns. 132; 1 Emerigon, Ap., ch. 4, § 8, p. 120; Voet ad Pand., lib. 44, tit. 3, § 12, tom. 2, p. 877; Casaregis, Disc. 129, § 58, 130, § 33; Erskine, Inst 633, § 48; Kames on Equity, 363, § 6. In Blanchard *v.* Russell, 13 Mass. 1, *Parker*, C. J. does not seem to have considered the question of the statute of limitations. To come within the exception in the statute of limitations of contracts by "specialty" in Virginia, it must appear that the instrument is a specialty by the law of Virginia; it is not enough that it was treated

that in France the limitation or prescription of the place where

as a specialty by the law of the place where made. Bank of U. S. *v.* Donnally, 8 Pet. 361. The Court of Appeals also held, in Virginia, in an action of debt upon a judgment obtained in North Carolina, that their own statute of limitations applied, and not that of North Carolina. Jones *v.* Hook, 2 Rand. 303. In Le Roy *v.* Crowninshield, 2 Mason, 151, it was held that the plea of the statute of limitations of the State where the contract was made is no bar to the suit in the foreign tribunal. But the statute of limitations of the forum is a good bar. In Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 207, the Chief Justice said: "Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances *shall amount to evidence that a contract has been performed*, than dispense with its performance." In British Linen Co. *v.* Drummond, 10 B. & C. 903, an action was brought on an instrument made in Scotland, and not barred by the laws of Scotland. It was held that the English statute of limitations was a good plea. The very converse, namely, that an action barred by the French statute of prescription might still be brought in England within the time allowed by the English statute of limitations, was held in Huber *v.* Steiner, 2 Bing. N. C. 202, 2 Scott, 304, 1 Hodges, 206, 2 Dowl. Pr. Cas. 781, 4 Moore & S. 328. See M'Elmoyle *v.* Cohen, 13 Pet. 312; Townsend *v.* Jemison, 9 How. 407; King *v.* Lane, 7 Misso. 241. Although the foreign statute of limitations may have closed on the demand before the removal of the party to a new jurisdiction, yet it will be unavailing. The statute of limitations of the forum can alone be regarded by the courts. Estes *v.* Kyle, Meigs, 34. *Contra*, Goodman *v.* Munks, 8 Port. Ala. 89. In Bulger *v.* Roche, 11 Pick. 36, a case is found in which the circumstances were as follows. A note was made in Halifax, where both the parties remained until the Nova Scotia statute of limitations had run against the claim. They then removed to Massachusetts, where the action was brought. It was held that the Massachusetts statute could not be a good plea in bar until the defendant had resided more than six years in the State jurisdiction. The opinion was delivered by *Shaw*, C. J., and this question settles the doubt raised by Mr. Justice *Story*, in Le Roy *v.* Crowninshield, 2 Mason, 151, whether, if the parties had remained in the place of the contract until the statute of limitations had closed over the debt, the courts of a foreign country would not be obliged to notice this. This case is somewhat doubted by Mr. Justice Story, in his Conflict of Laws. But see Don *v.* Lippmann, 5 Clark & F. 1; Sissons *v.* Bicknell, 6 N. H. 557; Dunning *v.* Chamberlin, 6 Vt. 127; Way *v.* Sperry, 6 Cush. 238; Shelby *v.* Guy, 11 Wheat. 361; Little *v.* Blunt, 16 Pick. 359. See Davis *v.* Minor, 1 How. Miss. 183. The question is one of interest, whether a statute which rendered the contract after a certain time wholly void might not be pleaded in a foreign jurisdiction. It seems the better opinion, that all right to sue would be taken away. Huber *v.* Steiner, 2 Dowl. Pr. Cas. 781, 4 Moore & S. 328, 2 Bing. N. C. 202, 2 Scott, 304, 1 Hodges, 206; Story, Confl. of Laws, 487; Byles on Bills, 320. The doctrine of Bulger *v.* Roche, 11 Pick. 36, quoted *supra*, does not seem to prevail everywhere. For example, in Harrison *v.* Stacy, 6 Rob. La. 15, a resident of Mississippi sued in Louisiana on a note barred by the statute of limitations in the former State. It was held that it was barred also in Louisiana. This seems to coincide with the opinion expressed by Pothier, Traité de la Prescription, note 251, who thinks the *lex loci*, and not the *lex fori*, should govern. The question is not, and from the nature of the case cannot be, definitively settled by the Continental jurists. See Huberus, De Conflictu Legum, § 7; Voet ad Pand. 44, 3, 15; Lord Kames, Eq. 63, ch. 8, § 4; Story, Confl. of Laws, pp. 482 – 487. The question in Bulger *v.* Roche was not whether the debt would be barred if the statute of limitations where it was made had once closed over it

the contract was made would prevail, no matter where the contractor was sued.(*w*)

Although, as we have observed, statutes of limitations usually provide that no action shall be maintained after a certain time, and therefore affect only the remedy, there may be statutes of limitations of a different kind. Our statutes of limitations need not be pleaded or offered in defence; in which case the age of the action is no objection to its validity.(*x*) It is well known that administrators or guardians may elect to use the statute in defence or not. Suppose, however, the statute should provide that, after the lapse of a certain time, a contract should be null and void. The discharge of a contract in the place where it is made is usually valid and binding everywhere, and the question has occurred, but has never been definitely decided, whether such a statute would not operate somewhat differently. We think that, if the obligation of a contract were expressly extin-

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while both the plaintiff and defendant were there resident. But the court said that this circumstance would make no difference. Mr. Justice Story seemed to regard that case as more doubtful; and it was held in Goodman *v.* Munks, cited *supra*, that, where the maker of a note remained in South Carolina till the debt was *barred* by the statute of limitations, such bar might be pleaded in any other jurisdiction. In this case the statute has closed over the claim, as it is termed. The parties had resided in the State till the statute had operated upon the debt. The learned judge, in delivering the opinion of the court, said: "For myself, I am free to admit that, if this question were *res integra*, I should be apt to consider the limitations of the *lex loci* as entering into the contract. The maker of a note must be supposed to have in view the prescription of the country where it is made or to be paid, and to stipulate in reference to it, in the same manner as if it were inserted *in hæc verba*. Nash *v.* Tupper, 1 Caines, 402." In State *v.* Swope, 7 Ind. 91, the statute in force at the time when and in the place where the action is commenced, is said to be the only one to be considered. The statute applies which is in force at the time of commencing the action. As to cause of action existing at the time of passing the law, reasonable time must be allowed for instituting suit. State *v.* Clark, 7 Ind. 468. But exactly the reverse of Goodman *v.* Munks has been decided in a late Massachusetts case. Putnam *v.* Dike, 13 Gray, 535. See Brigham *v.* Bigelow, 12 Met. 268; Estes *v.* Kyle, Meigs, 34. In Smith *v.* Crosby, 2 Texas, 414, the defendant, having moved to Texas, made a note in South Carolina, on which he was sued in Texas. The statutes of both States were pleaded. It was held that the statute of South Carolina could not be a bar, because it had not closed over the claim at the time of removal to Texas, but that the statute of Texas was good. The doctrine in the text is fully supported by the case of the British Linen Co. *v.* Drummond, 10 B. & C. 903. An action was brought in England on a Scotch contract, the law of which allowed forty years for bringing the suit; but it was held that the English rule must apply.

(*w*) Pardess. 223.

(*x*) Goodman *v.* Munks, 8 Port. Ala. 84.

guished after a certain period of time, it could not be revived by a suit in another country, where the law applies such rules only to the remedy.(*y*)

This, however, cannot happen in the United States, for such a law would clearly impair the obligation of contracts, which no State can do. Nor can a statute of limitations be passed affecting contracts already in existence; but such a statute enters into and makes part of all subsequent contracts.

The case may also present itself in which the parties have remained inhabitants of the State in which the contract is made until it is barred by the statute of limitations. The same debt may afterwards be made the subject of a suit in another jurisdiction, where the defendant may have property. This case has actually occurred, and it seems that no statute can be pleaded except that of the parties' residence; and that persons having claims barred in the State where the contract is made, may bring suit by attaching the debtor's property in another jurisdiction.(*z*)

A recent decision given in New York involves several principles of the *lex fori*. A suit was brought in New York upon a promissory note made and witnessed in Massachusetts; it appeared that in Massachusetts the statute of limitations did not run against such a note; but the court held that the New York statute alone could be applied by way of limitation, and this barred the action.(*a*)

(*y*) In Williams *v.* Jones, 13 East, 439, Lord *Ellenborough* said, in speaking of the statute: "But here there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority for saying that, where there is an extinction of the remedy *only* in the foreign court, that shall operate by comity as an extinction of the remedy here also. *If it go to an extinguishment of the right itself, the case may be different.*" See Le Roy *v.* Crowninshield, 2 Mason, 151; Poth. Ob., n. 636–639; Voet ad Pand., Lib 4, tit. 1, § 29; Huber *v.* Steiner, 2 Bing. N. C. 202, 2 Scott, 304, 1 Hodges, 206; Don *v.* Lippmann, 5 Clark & F. 1, 12, 15.

(*z*) Putnam *v.* Dike, 13 Gray, 535. In this most remarkable case, we are informed that the defendant had never been in Massachusetts; that the plaintiff was also not a resident of Massachusetts. The debt was contracted in 1815, and case decided in 1859. The debt had increased by simple interest to three times the amount originally due. This is the logical result, however, of the theory that the statute of limitations is a question of remedy merely, and not of right.

(*a*) Nicolls *v.* Rodgers, 2 Paine, C. C. 437. The Massachusetts rule prevails in Maine also. Lincoln Academy *v.* Newhall, 38 Maine, 179.

SECTION XVI.

OF THE LAW OF PLACE AS APPLICABLE TO THE GARNISHEE OR TRUSTEE PROCESS.

In many of our States there exists what is called a trustee or garnishee process, or process of foreign attachment. By this process one who holds the money, chattels, or effects of another may be summoned into court in an action against the latter, and compelled to disclose the property in his possession; and such property is then held by the trustee to answer the result of the suit. In some of the United States this process does not extend to one who is the debtor of the defendant in such a suit by reason of making a negotiable promissory note. This rests upon the possibility, which always exists, that such a note may have been indorsed, or may be afterwards indorsed, to a *bona fide* holder, whose claim the maker cannot dispute. But it is also intended, undoubtedly, to favor the unrestricted use of negotiable paper in business communities. In others of the States, as Vermont, New Hampshire, Kentucky, and Georgia, the maker of a note, like any other debtor, may be trusteed in an action against the promisee, and the promisee is at the time of the trustee process presumed to be the owner of the note, unless notice of its indorsement has been given previously to the makers. This of course must affect with some suspicion all negotiable paper (*b*) made in those States, as notice of

(*b*) In Hull *v.* Blake, 13 Mass. 153, it appeared that the defendant made a note in Georgia, payable to one Billings, by whom it was indorsed to the plaintiff at Providence, R. I. The defendant pleaded a judgment in Georgia against Billings and himself as garnishees. The plaintiff had already commenced and discontinued a suit in Georgia against the defendant. Upon general demurrer, *Parker*, C. J. said: "The plaintiff, although his contract with Billings, his indorser, was made in the State of Rhode Island, and so probably subject to the laws of that State, must be considered as having purchased a security which was subject for its construction and its legal qualities and character to the law of Georgia, it being a well settled principle that the law of the place where a contract was made is to govern in its construction, and that by the law of the same place it may be avoided and defeated. The notes were dated at Augusta, in the State of Georgia, and the plaintiff, when taking them as his property, must be presumed to have known that they were made with reference to the laws of that State." It seems from this case that the maker of a negotiable instrument is discharged by a payment to the payee, before maturity, though the note has before been indorsed to an innocent party. It was also held, that it was not necessary for the defendant to resort to the highest judicial tribunals. "The laws of the place where a contract is made

indorsement must be made in order to preserve to an indorsee the right of action in case the maker is served with a trustee process. The case, then, may often occur of a note made in one of these States, and indorsed before maturity to a holder in another State. The maker is then trusteed in his own State in an action against the promisee, and is held liable. If such a maker be

necessarily make a part of a contract, and are understood as its governing principle." This case is misreported in Phillips & Sewall's ed. of Bayley on Bills, 1836, 80, note *g*; the note is said to have been made in Massachusetts, which presents a case materially different. In a later case, decided in 1833, in Massachusetts, Meriam *v.* Rundlett, 13 Pick. 511, per *Shaw*, C. J., the decision in Hull *v.* Blake is quoted and approved. The case, however, did not disclose the fact that the trustee or garnishee had paid anything, although judgment was given against him, which was held to be a good cause for a stay of proceedings. In Emerson *v.* Partridge, 27 Vt. 8, it appeared that A in Vermont gave a negotiable promissory note to B of Massachusetts, made payable in Vermont. It was indorsed to C of Massachusetts before maturity. The indorsee gave no notice to the payor till after he was summoned as trustee of payee. The trustee's rights were held to be determined by the law of Vermont, and not of Massachusetts The trustee was said to be in no danger by being made chargeable here, for a judgment of this character is respected everywhere. Hull *v.* Blake, 13 Mass. 153; Embree *v.* Hanna, 5 Johns. 101; Barrow *v.* West, 23 Pick. 270; Taylor *v.* Phelps, 1 Harris & G. 492. Chitty says also that, "if a bill or note is drawn or transferred, or is payable, in a foreign country, it is essential for the holder to be well informed of the laws of that country relating to the transfer of such bills." Chitty on Bills, 218. And this information would not be essential if the right of the indorsee were determined by the place of indorsement. There seems to be no doubt of the general rule, that, if A be held liable as garnishee, he will not again be held liable as still indebted to B, the defendant, for whom he has been summoned as garnishee. Holmes *v.* Remsen, 20 Johns. 229. See also Andrews *v.* Herriot, 4 Cowen, 508; Embree *v.* Hanna, 5 Johns. 101. A resident of Maryland was indebted to B & C, copartners in trade, on a book account. B & C dissolved their partnership, and C, for a valuble consideration, assigned all his interest in the partnership property, including the debt of A, to B. Afterwards D, a creditor of B, attached the debt in Maryland. After the attachment was laid in Maryland, B & C sue in New York for the same debt. The attachment pending in Maryland was held pleadable in abatement to a suit in New York. *Kent*, C. J. delivered the opinion of the court. If one is compelled to pay a debt once by a competent jurisdiction, he will not be compelled to pay it over again. "It has accordingly been a settled and acknowledged principle in the English courts, that where a debt has been recovered of the debtor under this process of foreign attachment in any English colony or in these United States, the recovery is a protection in England to the garnishee against his original creditor, and he may plead it in bar. — Chevalier *v.* Lynch, 1 Doug. 170; Savage's Case, 1 Salk. 291; Cleve *v.* Mills, 1 Cooke, B. L., 8th ed. 333; Holmes *v.* Remsen, 4 Johns. Ch. 460; Allen *v.* Dundas, 3 T. R. 125; Holmes *v.* Remsen, 20 Johns. 229; Hunter *v.* Potts, 4 T. R. 182; M'Daniel *v.* Hughes, 3 East, 367; Sill *v.* Worswick, 1 H. Bl. 665, 671, 680; Phillips *v.* Hunter, 2 H. Bl. 403, 410. — It may seem to be equally just, that a creditor should not be affected by a proceeding in a foreign court, of which he had no notice; and it is on this ground that Lord C. J. *De Grey* held, that a recovery by foreign attachment under the custom of London was of no avail as a protection to the garnishee, if notice of the proceeding had not been given to the creditor. Fisher *v.* Lane, 3 Wils.

sued in his own State courts by an indorsee of the note, after he has there been held liable as trustee, he must be discharged, as no court can hold the same person liable twice for the same debt. Again, we may suppose him afterwards sued in the courts of another State, by the holder, who is a citizen of the latter State, and an indorsee of the note before maturity. In this case, also, we incline to the opinion that the maker would be judged by the laws of his own State, and that his liability would be discharged by what is a discharge in his own State.(*c*)

The case is quite different where the note is made in a State where the maker is not liable to the trustee process, and the maker is summoned as the garnishee of the payee in a State

297. This last decision is not easily reconcilable with the others, and here are conflicting claims which have each a strong foundation in justice. The creditor ought not to lose his debt when he has had no opportunity to defend himself, and the debtor ought not to pay a second time a debt which he has been obliged to pay once under the process of a competent court; but the case of the creditor would not be so hopeless as that of the debtor, for he might probably resort to the person who sued out the attachment, and call upon him to make good his demand, or to refund the money which the law might well presume he had received for the use of the creditor of the garnishee. This was the principle of the decision in Phillips *v.* Hunter, 2 H. Bl. 402. Admitting the cases to stand equal in equity (and the claim of the debtor to protection who has been obliged to pay once must be admitted to be at least equal in equity), the interest of the defendant ought to be preferred. If, then, the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est jure.* In Brook *v.* Smith, 1 Salk. 280, Lord *Holt* held that a foreign attachment before writ purchased in the suit was pleadable in abatement. If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that, if the priority of the attachment in Maryland be ascertained, the courts in that State would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad, and subjecting himself to a suit and recovery here. . . . . We are accordingly of opinion, that the attachment was pleadable in abatement; and that, agreeably to the stipulation in the case, the plaintiff's must be nonsuited." In Wheeler *v.* Raymond, 8 Cowen, 311, it was held that when a defendant appears in a court of general jurisdiction in a neighboring State (one of the United States), the judgment of that court is conclusive against him, and shall have the same effect as a judgment in a court of general jurisdiction in this State. It will, therefore, be conclusive against him, that the court of the neighboring State had jurisdiction under a statute of the State; the proceedings purporting to be under that statute. And he cannot question the jurisdiction of that court in pleading.

(*c*) See preceding note.

where the reverse is the law. Two questions may arise with regard to his liabilities: — 1st, whether the courts of a State would hold the maker of a note liable to their trustee process when he was not so liable in his own State where it was made; and, 2d, whether, if held so liable by such courts, he would be allowed to use such a defence, namely, that he had once been held liable, against the innocent holder or indorsee in his own State. In the first place, the liability of the maker is that of the place where the note is made, and the indorsee has a right to claim that law as governing the contract between them, and so hold him at all events. If, then, by his own law, the maker is not excused from liability to an indorsee, and by his own law is not liable as trustee or garnishee, this ought to be a defence everywhere.

If he could be so held upon going into another State, and that State decision were binding upon another court, then, as no one should be compelled to pay twice, all notes in the United States are taken by indorsees with this risk, that the maker may be held as trustee of the payee. Or if the maker is to be held in both States, the maker of a note is to run the risk of becoming liable to the process of another State, either against his person or the property there situated.

We cannot, however, think that the maker of a negotiable note in Massachusetts would be held liable to the trustee process in another State, nor do we think that an innocent indorsee would be prejudiced by a decision against a maker as garnishee of the payee of such a note in another State of the Union.

But the other ground taken is, that the trustee process is only one kind of remedy, and that each State must regulate its own. Suppose a case in which the maker of a note in Vermont is trusteed in Massachusetts. The law which governs the note is such, that he is liable to such trustee process; but the Massachusetts statute says no one shall be adjudged trustee by reason of having made a negotiable note. Would it be a good rejoinder, in case the statute of Massachusetts were pleaded by such trustee, to show that the law of Vermont was otherwise, and that the maker of such a note was there liable as trustee? We think not, and that the Massachusetts statute would be held to regulate the remedy.

But if we consider the trustee process as a matter of remedy, we get into other difficulties; for, to take the converse of our last

hypothesis, A makes a note to B in Massachusetts, and afterwards in Vermont is trusteed in a suit against the promisee. If the Vermont statute be pleaded by A, it affords him no defence. The Massachusetts statute would discharge such a maker, but we have decided it to be only of remedy, and therefore of force only in Massachusetts. But if it appeared that such maker would still be liable in the place of making the note to an innocent indorsee, a court of another State would be unwilling to hold him liable. It would seem as if there must be here a kind of compromise between remedy and right.

Many difficult and unsettled questions arise, and must continue to arise, under our form of government and our intimate commercial relations. This is especially the case with regard to the trustee or garnishee processes of the various States, as well as the process of foreign attachment. Suppose a creditor in Maine sues a Boston firm, and trustees one of their debtors there. The latter on coming to Massachusetts is arrested in a suit by the same firm. What remedy or relief can he have? The claim in Maine may be invalid, but it is not yet so decided. The only means seems to be to plead in abatement to the second suit, that another cause is pending, and allow the claim of the jurisdiction which first attaches to be first settled.(*d*)

A court might hesitate about making a party pay the same debt twice; but if one tribunal decides incorrectly, this might seem to be no sufficient reason why another should do so also; and on this ground it may perhaps be held, that the maker must still be liable in Massachusetts, whether liable or not in Kentucky, on the garnishee process. We are inclined to think, however, that he would be protected by the rule emphatically stated in 3 Kent, and sustained by strong authorities, as we have shown in our note.(*e*)

(*d*) A proceeding by foreign attachment will abate or bar a suit commenced here, accordingly as it is pending or carried to judgment, in the same manner as a suit commenced here for the same cause. Brook *v.* Smith, 1 Salk. 280; Chevalier *v.* Lynch, 1 Doug. 170; Cleve *v.* Mills, 1 Cooke's Bank. Law, 8th ed. 333; Embree *v.* Hanna, 5 Johns. 101; Savage's Case, 1 Salk. 291; Chevalier *v.* Lynch, 1 Doug. 170; Fisher *v.* Lane, 3 Wilson, 297. This last case is questioned in Embree *v.* Hanna, 5 Johns. 101; Nathan *v.* Giles, 5 Taunt. 558. But a suit commenced by process against the person between the same parties will not abate a suit in another country for the same cause. Bowne *v.* Joy, 9 Johns. 221, and cases there cited. It is otherwise if carried to judgment. Ibid. Griswold *v.* Pitcairn, 4 Conn. 85.

(*e*) See *supra*, note *b*.

CHAPTER XI.

OF INTEREST.

At common law, interest is not recoverable on any debt, either as an incident to the debt, or as an independent obligation, or by way of damages for non-payment.(*a*) In modern times this rule is greatly qualified, partly under the influence of

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(*a*) "It seemeth formerly to have been the general opinion that no action could be maintained on any promise to pay any kind of use for the forbearance of money, because that all such contracts were thought to be unlawful, and consequently void." Hawkins's Pleas of the Crown, B. 1, ch. 82, § 6. "In 1546, a law was made," says Hume, "for fixing the interest of money at ten per cent, the first legal interest known in England. Formerly, all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and criminal." Hist. of Eng., ch. 33. The statute referred to by Hume is the 37 Henry VIII. ch. 9, which provides that "none shall take, for the loan of any money or commodity, above the rate of ten pounds for one hundred pounds, for one whole year." In an anonymous case, in Hardres, p. 420, Lord *Hale* is reported to have said that: "Jewish usury was prohibited at common law, being 40 per cent, and more; but no other." But this is contrary to the general opinion. "The letting money out at interest," says Beawes, "or upon usury, these being formerly regarded as synonymous terms, was against the common law; and in times past if any one after his death was found to have been an usurer, all his goods and chattels were forfeited to the king." Lex Mercatoria, p. 402. This punishment for taking usury is spoken of by Glanville; lib. 7, c. 16. Usury was forbidden in England as early as the time of Alfred; and Fleta and Bracton, as well as Glanville, bear ample testimony to the abhorrence in which it was held, and to the severity with which it was punished. See Comyn on Usury, ch. 1, p. 1. Usury was unlawful in all the reigns until the statute of Henry VIII. above referred to. "By the statutes of 3 Henry VII. and 11 Henry VII.," observes Sir Edward Coke, "all usury is damned and prohibited; and there it is called dry exchange. So as usury is not only against the law of God and the laws of the realm, but against the law of nature, *Usura contra naturam est, quia usura sua natura est sterilis, nec fructum habet.*" 3 Inst. 153. See statutes 5 & 6 Edward VI. ch. 20; and 13 Elizabeth, ch. 8. As late as the 20th of James I., in the case of Saunderson *v.* Warner, 2 Rolle, 239, Mr. Noy (afterwards attorney-general), gravely asserted in his argument that, "according to an ancient nook in the Exchequer, called *Magister et Tilburiensis*, usurers are well ranked amongst murderers." The ten per cent interest allowed by the statute of 27 Henry VIII., ch. 9, was revived by the 13 Elizabeth, ch. 8; and the 21 James I., ch. 17, ordained eight per cent. The 12 Charles II., ch. 13, lowered i

some English statutes; (*b*) but, in this country, principally if not altogether by usage and adjudication. Indeed, the rule may be considered as entirely at an end in regard to promissory notes and bills of exchange.

It is frequently expressed in promissory notes not negotiable, but rarely so in negotiable paper. When expressed, the words used by the parties determine their rights: and if they require construction, this is generally, if not always, in favor of interest. Thus, "with interest," or "bearing interest," or any such phrase, will be held to imply interest from date; (*c*) and this even if there be other terms implied which may well raise a doubt. (*d*) As a promise to pay in one year after the maker's

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and the 12 Anne, ch. 16, to five per cent, at which rate it has remained fixed ever since. Beawes, Lex Mercatoria, p. 362. The statute 13 Eliz., above referred to, allowing ten per cent interest, recites, "that all usury being forbidden by the law of God, is sin, and detestable"; and the 21 Jac. I, reducing the rate to eight per cent, provides, that "nothing in the law shall be construed to allow the practice of usury in point of religion or conscience." Rolle says that this clause was introduced to satisfy the bishops, who would not pass the bill without it. Oliver *v.* Oliver, 2 Rolle, R. 469.

(*b*) Before the 3 & 4 Wm. IV., ch. 42, interest was not recoverable as damages on an implied contract to pay it, although after demand had been made of the principal debt. Walker *v.* Constable, 1 Bos. & P. 306; Havilland *v.* Bowerbank, 1 Camp. 50; De Bernales *v.* Fuller, 2 id. 426; Page *v.* Newman, 9 B. & C. 378. It was otherwise however, with bills and notes by the usage of trade.

(*c*) Kennerly *v.* Nash, 1 Stark. 452; Doman *v.* Dibden, Ryan & M. 381; Hopper *v.* Richmond, 1 Stark. 507; Winn *v.* Young, 1 J. J. Marsh. 51; Inglish *v.* Watkins, 4 Pike, 199; Whitton *v.* Swope, 1 Littell, 160; Pate *v.* Gray, 1 Hempst. C. C. 155; Kilgore *v.* Powers, 5 Blackf. 22; Ely *v.* Witherspoon, 2 Ala. 131; Dickinson *v.* Tunstall, 4 Pike, 170; Dewey *v.* Bowman, 8 Calif. 145. And even where no action could originally have been maintained upon the note, as having been given to a married woman by her husband and two other persons jointly and severally, it was held that she might not only recover against either of the other makers within six years after the death of her husband, but obtain interest from the date. Richards *v.* Richards, 2 B. & Ad. 447.

(*d*) Where several notes were payable at distant days, some with interest at three per cent per annum, if paid at maturity, "if not, six per cent interest to be paid"; and one payable without interest "until the note is out, if not paid then, lawful interest until paid"; the notes not being paid at maturity, it was held that there were valid agreements for interest from the date of the notes. Daggett *v.* Pratt, 15 Mass. 177. And where a bill of exchange was drawn, payable six months after date, with six per cent interest if not paid at maturity, it was held that interest should be computed from the date of the bill, and not from the time of the default. Hackenberry *v.* Shaw, 11 Ind. 392. This case is there distinguished from Billingsly *v.* Cahoon, 7 Ind. 184, and Wernwag *v.* Mothershead, 3 Blackf. 401, as in each of those cases the agreement was for a higher rate of interest, upon default, than the law would give in the absence of any agreement; and hence, as effect could be given to the language employed, without allowing interest from the date of the notes, interest was held to run from their ma-

death £ 300, with interest, carries interest, not from the death of the maker, but from the date of the note.(*e*)

When interest is not expressed, the general rule is this: If the paper be on time, interest begins to run from its maturity, because the money is due.(*f*) If on demand, then it runs from demand, and not before, because until demand the money is not due.(*g*) If no previous demand is proved, the interest begins with the issuing of the summons.(*h*)

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turity only. In Parvin *v.* Hoopes, 1 Morris, 294, a note payable at a given time, "with ten per cent interest if not paid when due," was held to bear the specified interest from the date of the note. To the same effect see Horn *v.* Nash, 1 Iowa, 204.

(*e*) Roffey *v.* Greenwell, 10 A & E. 222, 2 Per. & D. 365. In this case no previous dealings between the parties were shown; but, in the absence of proof, it was presumed that the note was given for value. Had the evidence proved the contrary, so as to render the note a voluntary gift, in the nature of a legacy, it appears that the interest would have been held to run from the maker's death. Same case, 2 Per. & D. 365. And similarly, a note payable on and after the death of a certain person, with annual interest, was held to carry interest from its date. Washband *v.* Washband, 24 Conn. 500.

(*f*) Gantt *v.* Mackenzie, 3 Camp. 51; Laing *v.* Stone, 2 Man. & R. 561; Lithgow *v.* Lyon, Coop. Ch. Cas. Temp. Eldon, 29; Lowndes *v.* Collens, 17 Ves. 27; Powell *v.* Guy, 3 Dev. & B. 70; Rollman *v.* Baker, 5 Humph. 406; Pollard *v.* Yoder, 2 A. K. Marsh. 264, 267; Jacobs *v.* Adams, 1 Dallas, 52; Joyner *v.* Turner, 19 Ark. 690; Ayres *v.* Hayes, 13 Misso. 252; see Stat. of North Carolina, R. C. 1854, ch. 13, § 14, p. 110; Alabama Code, 1852, § 1520. But where a bill upon which interest was not expressly reserved became due after the death of an intestate, and before administration, it was held that interest ran, not from the maturity of the bill, but from demand by the administrator, inasmuch as at the time it became due there was neither a person competent to sue for the money nor one authorized to receive it. Murray *v* East India Co., 5 B. & Ald. 204.

(*g*) Upton *v.* Ferrers, 5 Ves. Jr. 801; De Havilland *v.* Bowerbank, 1 Camp. 50; Blaney *v.* Hendricks, 2 W. Bl. 761; Lowndes *v.* Collens, 17 Ves 27; Lithgow *v.* Lyon, Coop. Ch. Cas. Temp Eldon, 29; Barough *v.* White, 4 B. & C. 325, 6 Dow. & R. 379; Cannon *v.* Beggs, 1 McCord, 370; Nelson *v.* Carmel, 6 Dana, 7; Dillon *v.* Dudley, 1 A. K. Marsh. 66; Bartlett *v.* Marshall, 2 Bibb, 467; Schmidt *v.* Limehouse, 2 Bailey, 276; Whitton *v.* Swope, 1 Littell, 160; Gore *v.* Buck, 1 T. B. Mon. 209; Pate *v.* Gray, 1 Hempst. C. C. 155; Maxey *v.* Knight, 18 Ala. 300; Breyfogle *v.* Beekley, 16 S. & R. 264; Scudder *v.* Morris, Penning., 2d ed. 418; Patrick *v.* Clay, 4 Bibb, 246. So by Stat. of Tennessee, Code 1858, Art. 1947. In Arkansas, it is held that a note payable on demand draws interest from date. Pullen *v.* Chase, 4 Pike, 210; Walker *v.* Wills, 5 id. 166; Pate *v.* Gray, 1 Hempst. C. C. 155. In North Carolina, bills and notes payable on demand bear interest from the time they are demandable, unless otherwise expressed. R. C. 1854, ch. 13, § 5, p. 110. A due-bill for the payment of a certain sum "when wanted," is in effect payable on demand, and is not entitled to draw interest until demand is made. Goodwin *v.* Hazzard, Smith, Ind. 320. Where the lender calls for, and actually takes, security for the loan, he is entitled to interest from that time, this being equivalent to a demand. Etheridge *v.* Binney, 9 Pick. 272.

(*h*) Pierce *v.* Fothergill, 2 Bing. N. C. 167, 2 Scott, 334; Hunt *v.* Nevers, 15 pick 500, 505 · Scudder *v.* Morris, Penning., 2d ed. 418.

If a note be payable by instalments, and on failure of any instalment the whole amount is to become due, and a default occurs, interest is to be cast from that time upon the whole amount then remaining due, and not upon the remaining instalments, as they would have been payable.(*i*)

If a note payable at a specified time expressly bears interest only after another and later specified time, and is sued when due, the judgment, it is said, will bear interest from its rendition.(*j*)

A memorandum check for borrowed money, not payable on a day certain, and not expressly on demand, has been held to bear interest from its date.(*k*)

Interest continues to run to the rendition of judgment; (*l*) or by the practice, as we understand, in some of our courts, to the issuing of the execution.

And if money be paid into court upon a security bearing interest, the interest must be paid up to that time, and not to the commencement of the action merely.(*m*) Interest ceases to run after a proper tender of the debt.(*n*)

Interest is to be considered as a part of the debt, where it is expressed; for in such case it enters into the understanding of the parties, and it is declared by them to be a part of their bargain. This, at least, must be the general rule; although there may be circumstances or phraseology which would give it the character of liquidated damages.(*o*) When interest is not expressed by the parties, but is given by the law, here it is certainly

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(*i*) Blake *v.* Lawrence, 4 Esp. 147.

(*j*) Billingsley *v.* Billingsley, 24 Ala. 518.

(*k*) Glover *v* Graeser, 10 Rich, Eq. 441. Not so with English country bankers' notes payable on demand. Parker *v.* Hutchinson, 3 Ves. 133. In trover for a bill the jury may give damages in the nature of interest, although it be not specially declared for. Paine *v.* Pritchard, 2 Car. & P. 558. And juries are so empowered by 3 & 4 Wm. IV., ch. 42, § 29.

(*l*) Robinson *v.* Bland, 2 Burr. 1077, per Lord *Mansfield;* Bodily *v.* Bellamy, id 1094. And see Jarrold *v.* Rowe, 8 Price, 582; Florence *v.* Jenings, 2 C. B., N. S 454.

(*m*) Kidd *v.* Walker, 2 B. & Ad. 705.

(*n*) Dent *v.* Dunn, 3 Camp. 296, Lord *Ellenborough*: "I think interest ought to stop from the offer to pay." Suffolk Bank *v.* Worcester Bank, 5 Pick. 106.

(*o*) Watkins *v.* Morgan, 6 Car. & P. 661; Chinn *v.* Hamilton, 1 Hempst. C. C. 438; Marshall *v.* Poole, 13 East, 98; Davis *v.* Smyth, 8 M. & W. 399; Hudson *v.* Fawcett, 7 Man. & G. 348; per *Bayley*, J., Cameron *v.* Smith, 2 B. & Ald. 305, 308; Florence *v.* Jenings, 2 C. B., N. S. 454; Florence *v.* Drayson, 1 id. 584. See *infra*, p. 797, note *v.*

to be taken as damages for the non-payment.(*p*) An important

(*p*) Du Belloix *v.* Waterpark, 1 Dow. & R. 16; Cameron *v.* Smith, 2 B. & Ald. 305; Ex parte Marlar, 1 Atk. 150; Lithgow *v.* Lyon, Cooper, Ch. Cas. Temp. Eldon, 29; Chinn *v.* Hamilton, 1 Hempst. C. C. 438; Guy *v.* Franklin, 5 Calif. 416; Davis *v.* Greely, 1 Calif. 422; Joyner *v.* Turner, 19 Ark. 690; Crosby *v.* McDermitt, 7 Calif. 146. The statutes passed in England in regard to interest, and generally those enacted in this country, are merely prohibitory of interest being taken above a certain rate; they are negative, and not affirmative; they do not declare in what cases interest shall be taken, nor do they require it to be paid in any case. The payment of interest not being required either at common law nor by statute, it follows that whenever the courts allow interest as such, as incidental to the debt, they do so on the ground of the agreement of the parties, either express or implied. Unless so contracted for, courts never allow interest as the judgment of law. In Calton *v.* Bragg, 15 East, 223, 226, in the Court of King's Bench, Lord *Ellenborough* said: "Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years; and during this long course of time, no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest been ever given." The class of cases where interest is allowed by the court, as an incident to the debt, must be carefully distinguished from that class of cases where it is allowed by juries, as a measure of damages, under the advice of the court, but in their absolute discretion. "The confusion and mingling of these classes has led to much of the difficulty which has arisen on this subject." See per *Spencer*, Senator, in Rensselaer Glass Factory *v.* Reid, 5 Cowen, 587, 610. And even where interest is specially reserved by the terms of the bill or note, it is recoverable as such only to the time of default of payment, since the terms of the contract itself would not oblige the borrower to pay interest after that time; and what is recovered after default, in addition to the amount due on the contract by its terms, is recovered as damages for the unlawful detention of the money only, and not as interest; "and the legal rate of interest would be adopted only as a general, convenient, and uniform rule for determining the amount of such damages, — a rule arbitrary indeed, but established on the idea that the creditor might, and the presumption that he would, have made the money due to him, if he had received it when due, profitable to the extent of the legal rate of interest, and preferable to an inquiry in each case, if indeed such inquiry would be practicable, as to the exact amount of loss sustained by him by the non-payment of the money." Per *Storrs*, C. J. in Fisher *v.* Bidwell, 27 Conn. 363, 371. But the legal rate of interest is not always adopted as the measure of damages. Where a bill was drawn for a given sum "with interest at ten per cent per annum," the drawer was made liable for interest at ten per cent after the maturity of the bill and notice of the dishonor. Keene *v.* Keene, 3 C. B., N. S. 144. *Willes*, J.: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages, at the discretion of the jury. Colonel Fremont had to pay twenty-five per cent (the California rate of interest) upon the bills which he drew there on Mr. Buchanan, the Secretary of State of the United States at Washington, and which bills had been protested for non-acceptance. See Gibbs *v.* Fremont, 9 Exch. 25, 20 Eng. L. & Eq. 555. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed; and the master is substituted for a jury." In accordance with these principles, it was held in Kohler *v.* Smith, 2 Calif. 597, where a note was given for $1,000, payable two months after date, with interest at five per cent per month, that if the

consequence of this is, that juries have much power over it.(*q*) And it is a general principle that a jury may reduce or withhold the interest, where it is given by the law, and not by the express words of the parties, and where the non-payment evidently results from the wrongful negligence of the creditor.(*r*)

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maker did not pay at the end of two months, he was to be charged at this rate of sixty per cent per annum, and not at the ordinary statute rate of ten per cent per annum. To the same effect, see Pridgen *v.* Andrews, 7 Texas, 461; Hopkins *v.* Crittenden, 10 id. 189; Kilgore *v.* Powers, 5 Blackf. 22; Chinn *v.* Hamilton, 1 Hempst. C. C. 438; Brewster *v.* Wakefield, 1 Minnesota, 352. In the latter case, *Chatfield*, J. said: "As well might it be said that a tenant holding over after the expiration of his term should not pay rent at the rate reserved in the lease under which he entered, and should be liable to pay only the reasonable value of the use, as that the maker of the note should not be liable to pay the rate of interest on his debt overdue, which he, by his written promise, agreed it should bear before maturity." But this decision was reversed on appeal by the U. S. Sup. Ct., 22 How. 118; and in Ludwick *v.* Huntzinger, 5 Watts & S. 51, 60, it was held that if a debt payable on a fixed day, with interest at three per cent., was not paid on the day, the subsequent interest should be at the legal rate of six per cent. The court said, that until maturity the agreement of the parties regulated the allowance of interest and the rate of it, but after that the law interfered, not only to allow but to regulate the rate of interest on account of the illegal detention.

(*q*) Whether the plaintiff in such case is entitled to interest upon his debt, is peculiarly a question within the province of the jury to decide. Per *Abbott*, C. J., in Du Belloix *v.* Waterpark, 1 Dow. & R. 16; Gantt *v.* Mackenzie, 3 Camp. 51. But it is not for the jury to determine the rate of interest to be given as damages when the interest is not governed by the express terms of the contract itself. Fremont, in California, drew a bill of exchange on Buchanan, Secretary of State, at Washington, and when the bill was presented for acceptance it was dishonored. The only question was, at what rate the interest was to be calculated. At the trial, *Alderson*, B. allowed the jury to say whether the interest was to be calculated at the California rate or the Washington rate; and they found that the plaintiffs were entitled to recover at the latter rate. The verdict was entered accordingly, with liberty to the plaintiffs to move to increase the damages by the addition of nineteen per cent. A rule *nisi* having been obtained accordingly, *Alderson*, B. said: "The amount of the interest in each place is to be so left (to the jury); and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact. Here the jury have found interest to be due, and that there was damage which ought to be recovered in the shape of interest. They also have found what the usual rate of such interest is at Washington and in California. But which rate is to be adopted by them is, as we think, a question purely of law for the direction of the judge to the jury. We think that direction should have been, in this case, that the California rate should be adopted by them, inasmuch as the contract of the drawer was made there. Therefore this rule must be absolute to enter the verdict for the plaintiff, with 19 per cent additional interest." Gibbs *v.* Fremont, 9 Exch. 25, 20 Eng. L. & Eq. 555.

(*r*) Keene *v.* Keene, 3 C. B., N. S. 144; Bann *v.* Dalzel, Moody & M. 228, 229, note, 3 Car. & P. 376; Laing *v.* Stone, 2 Man. & R. 561; Cameron *v.* Smith, 2 B. & Ald. 305; Du Belloix *v.* Waterpark, 1 Dow. & R. 16; Dent *v.* Dunn, 3 Camp. 296; Bradford *v.* Cooper, 1 La. Ann. 325. So in equity, Ex parte Williams, 1 Rose, 399;

So in bankruptcy,(*s*) and by parity of reason in other cases, where there are mutual bills and notes, and a balance or excess on one side, it carries no interest, unless the course of dealing between the parties, or other evidence, shows that this is intended.

So, if the paper was at or after maturity in the hands of an alien enemy, it carries no interest for the time it was in his hands, as during that time payment would have been illegal.(*t*) But interest is held to run even in such a case, if the alien enemy has an agent in the State in which the debtor resides, competent to receive payment, and this is known to the debtor.(*u*)

Interest is only an incident to the debt and accessory to it; and therefore whatever bars or discharges the debt terminates the interest;(*v*) unless, perhaps, there be two express and distinct con-

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Ex parte Cocks, id. 317; Lowndes *v.* Collens, 17 Ves. 27; Lithgow *v.* Lyon, Cooper, Ch. Cas. Temp. Eldon, 29.

(*s*) In the case Ex parte Marlar, 1 Atk. 150, it is said that where interest is not expressed in the body of the note, the jury on the trial do not give the plaintiff interest, but by way of damages only; and, therefore, that as commissioners of bankrupts cannot award damages, they cannot allow such creditors to prove for the interest due upon the notes. In Cameron *v.* Smith, it was held that interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill of exchange, unless interest be specially made payable on the face of the bill; and the reason for so holding, as given by *Bayley*, J. was, that interest is no part of the debt when not expressed, and that as the commissioners of bankrupts are only to receive proof of debts, they cannot allow anything to be proved which does not constitute part of the debt. 2 B. & Ald. 305. And such is the settled rule of the English cases. Ex parte Cocks, 1 Rose, 317; Ex parte Williams, id. 399; In re Burgess, 2 J. B. Moore, 745; Lithgow *v.* Lyon, Cooper, Ch. Cas. Temp. Eldon, 29. It is otherwise now in England by Statute 12 & 13 Viet, ch. 106, § 180.

(*t*) Du Belloix *v.* Waterpark, 1 Dow. & R. 16.

(*u*) Denniston *v.* Imbrie, 3 Wash. C. C. 396; Conn *v.* Penn, Pet. C. C. 496.

(*v*) Hollis *v.* Palmer, 2 Bing. N. C. 713; Baylis *v.* Ringer, 7 Car. & P. 691; Dixon *v.* Parkes, 1 Esp. 110; Clark *v.* Alexander, 8 Scott, N. R. 147; and see Florence *v.* Drayson, 1 C. B., N. S. 584; Stevens *v.* Barringer, 13 Wend. 639; Hodgdon *v.* Hodgdon, 2 N. H. 169; Moore *v.* Fuller, 2 Jones, N. C. 205; Comparet *v.* Ewing, 8 Blackf. 328; Tillotson *v.* Preston, 3 Johns 229; Howe *v.* Bradley, 19 Maine, 31. Some distinction is, however, made between those cases where there is an express undertaking by the party to pay both principal and interest, and those where he undertakes to pay the principal only. In Fake *v.* Eddy, 15 Wend. 76, the Chancellor said: "The cases of Tillotson *v.* Preston, 3 Johns. 229, Johnston *v.* Brannan, 5 id. 268, and People *v.* County of New York, 5 Cowen, 331, were all cases in which there was no contract for the payment of interest, and it could only be recovered as damages for the non-payment of the principal debt when it became due. In such cases, if the party to whom the money is payable accepts the amount agreed to be paid, in full satisfaction of the principal debt, without requiring the debtor to pay

tracts, one for the principal, and the other for something more by way of interest. But if the principal has been paid, or a new note or bill given for it, and interest which was due was not paid, it remains due, and an action may be maintained for it.(*w*)

A maker of a note or acceptor of a bill is liable for interest from the maturity of paper on time; but a drawer of a bill or an indorser is not. For as interest is given as damages for breach of contract, there must be a breach before it begins; and the indorser promises to pay only on condition of dis-

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interest from the time the debt became payable, he cannot afterwards maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest as well as the principal of the plaintiff's demand, I apprehend that the performance of one part of the agreement would be no bar to an action for the non-performance of another part thereof. It is a case of very frequent occurrence, that the interest is made payable before the principal becomes due; and no one ever doubted that, in such a case, an action could be maintained for the non-payment of the interest merely." Florence *v.* Drayson, 1 C. B., N. S., 584, was an action on the following agreement, made by the defendants with the plaintiff: "In consideration of your discounting for us the undermentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay *as interest thereon* £ 17 10*s.* for each month," &c., and it was held, that, inasmuch as the interest could only be claimed as accessory to the bill, the plaintiff could not recover interest which accrued after he had indorsed the bill over to a third person. *Manisty*, in behalf of the plaintiff, said: "The contract declared upon is a separate and distinct contract from that contained in the bill, and one upon which an action is maintainable quite irrespective of the bill. [*Crowder*, J.: 'Would interest be payable on the bill besides, or was the £ 17 10*s.* per month a substitution for the interest?'] As between the parties to the contract, it would no doubt be a substitution for interest on the bill; but not as between the defendants and a third party, the holder of the bill," &c. *Lush*, on the part of the defendants. "The contract assumes that the plaintiff shall be in a condition to demand interest on the bill." *Cockburn*, C. J. (stopping Lush): "It appears to me that there is no difficulty whatever in this case. The stipulation is for the payment of the £ 17 10*s.* per month *as interest on the bill*. Interest could only be payable on the bill to the holder of it, as accessory to the principal. When the plaintiff passed away the bill to a third person, he was no longer in a condition to demand interest. I think the defendants are entitled to judgment." *Cresswell*, J.: "I am of the same opinion. It is impossible to separate the right to the interest from the bill to which the interest was accessory." Florence *v.* Jenings, 2 C. B., N. S. 454, was an action on a similar agreement. In this case, the bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming by the particulars indorsed on the writ, interest as stipulated by the agreement, but declaring only on the bill, and obtained a verdict and judgment thereon. In this action, subsequently brought on the agreement, it was held, that the former judgment was no answer to the plaintiff's claim for interest accruing before the recovery of such judgment, but that the plaintiff was not entitled to recover in the second action interest accruing since.

(*w*) Lumley *v.* Musgrave, 4 Bing. N. C. 9; Baylis *v.* Ringer, 7 Car. & P. 691; Laing *v.* Stone, Moody & M. 229, note.

honor and due demand and notice. The principal is not, therefore, due from him until he has due notice of due demand; and not until then does the interest begin.(*x*) Nor, indeed, will an acceptor of a bill payable at a particular place be liable for interest without presentment at that place, or evidence that excuses, as proof that it must have been unavailing.(*y*) And it is said that an acceptor is not liable for interest until that very one of the set which was protested is presented to him; but this has not been judicially confirmed, and may, we think, be doubted, unless some circumstances give a peculiar value or importance to that very copy.

A guarantor of a note or bill is liable for the interest which is due upon it, unless he expressly excludes interest in his guaranty.(*z*)

If goods are bought, and there is an agreement for a note or bill to be given, and none be given, the agreement may still operate upon the interest, which will be due on the price of the goods from the same time on which it would have begun to run had the note or bill been given.(*a*)

(*x*) Walker *v.* Barnes, 5 Taunt. 240, per *Mansfield*, C. J.: "If the acceptor does not pay the bill when it is due, the drawer cannot find out by inspiration who is the holder; and till he finds out that, he cannot pay the bill; when he has found out who is the holder, he is bound to pay the bill within a reasonable time; if he does not, he is liable to damages for not performing his contract; those damages are the interest on the bill" See also Keene *v.* Keene, 3 C. B., N. S. 144. In Harrison *v.* Dickson, 3 Camp. 52, note, the plaintiff in an action against the indorser of a bill was allowed interest from the time of dishonor by non-acceptance; but it does not appear, however, from the report of the case, whether any interval had elapsed between the dishonor and notice to the defendant. See Gantt *v.* Mackenzie, 3 Camp. 51; Gibbs *v.* Fremont, 9 Exch. 25, 20 Eng. L. & Eq. 555.

(*y*) Phillips *v.* Franklin, Gow, N. P. 196; Murray *v.* East India Co., 5 B. & Ald. 204.

(*z*) Ackermann *v.* Ehrensperger, 16 M. & W. 99; *Pollock*, C. B.: "As the acceptor would not have duly paid the bills unless he had paid both principal and interest, the same consequences must apply as to the guarantor for the acceptor: it cannot mean one thing as to the principal and another as to the surety." The guarantor becomes fixed under his guaranty, when the notes or bills fall due and notice of non-payment is given to him, or a demand made upon him. Washington Bank *v.* Shurtleff, 4 Met. 30, 33.

(*a*) Marshall *v.* Poole, 13 East, 98; Farr *v.* Ward, 3 M. & W. 25; Becher *v.* Jones, 2 Camp. 428, note; Lowndes *v.* Collens, 17 Ves. 27; Porter *v.* Palsgrave, 2 Camp. 472; Boyce *v.* Warburton, id. 480; Middleton *v.* Gill, 4 Taunt. 298; Furlonge *v.* Rucker, id. 250. And it has been held, that in such case it may be recovered under the count for goods sold and delivered. Marshall *v.* Poole, 13 East, 98. But see Slack *v.* Lowell, 3 Taunt. 157.

CHAPTER XII.

OF USURY.

SECTION I.

WHAT CONSTITUTES USURY.

The amount of interest is regulated by law, and for a long time has been so in all civilized countries. The opinion that money should be bought and sold like any other commodity, and its price left free for the operation of the laws of supply and demand, has made much progress, and caused some relaxation of the laws relating to interest, both in England and in this country, and has had some influence, perhaps, upon adjudication, especially in reference to negotiable paper.

But the usury laws, so called, are still in force almost everywhere, however their ancient severity may have been relaxed.

Much that might be presented in relation to this topic, in a general treatise upon it, would have no application to notes or bills; and here we purpose to present only what it seems serviceable to know in connection with the subject of our work.

A usurious bargain is that whereby one party uses the money of another party, or delays payment of a debt to him, and for such use or delay is to pay more than lawful interest. By the earlier laws of England and of this country, this contract was wholly void, and neither the usurious interest, nor legal interest, nor the principal itself could be recovered, for all were forfeited; and if money were paid and received usuriously upon such a contract, it could be recovered back, and the receiver subjected to heavy penalties. These laws are essentially modified, as our notes will show; and generally, the effect or penalty is now limited to the loss of the usurious interest, and of some additional interest or principal. We endeavor to give in the note the usury laws in force in England and in the United States at

the time we write; but these laws are subject to frequent changes.(*a*)

(*a*) In England, the statute of 12 Anne, stat. 2, ch. 16, provides that no person shall take, directly or indirectly, upon any contract, "for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void"; and further provides that any person who shall take more than five pounds per cent, in violation of the statute, shall forfeit for every such offence treble the value of the moneys or other things lent. This statute has been modified by the 3 & 4 William IV., ch. 98, § 7, and 2 Vict., ch. 37, which last statute provides that "no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of ten pounds sterling," shall be void or affected by any statute for the prevention of usury, nor shall any party be subject to their penalties. These provisions, however, do not extend to "the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." No more than five per cent can be recovered in any suit, "unless it shall appear to the court that any different rate of interest was agreed to between the parties." This statute, it was held in Langton *v.* Haynes, 1 H. & N. 366, 37 Eng. L. & Eq. 590, in cases of loans on security of lands, does not render the personal securities, as bills and notes, valid, but both kinds of security are avoided; confirming Hodgkinson *v.* Wyatt, 4 Q. B. 749, and Fussell *v.* Daniel, 10 Exch. 581, 29 Eng. L. & Eq. 369; and overruling the recent equity cases to the contrary. Ex parte Warrington, 3 De G. M. & G. 159, 19 Eng. L. & Eq. 26. The above statute of 2 & 3 Vict., ch. 37, was continued by 13 & 14 Vict., ch. 56. But by 17 & 18 Vict., ch. 90, all the laws in force relating to usury were repealed. The legal or current rate of interest in existing contracts was declared to mean the same as before the passage of the act. The statutes of usury in several of our States have been copied, in substance, but with more or less variation of form, from the statute of Anne; "so that the English adjudications upon that statute," as was remarked by the court in Ruddell *v.* Ambler, 10 Ark. 369, 374, "are entitled to great weight and consideration by the courts here in determining questions arising under and growing out of the construction of ours." But generally in this country usury does not render the contract "utterly void," but works a forfeiture of interest.

Alabama. The rate of interest is fixed at eight per cent. Usurious contracts cannot be enforced, except as to the principal; and if any interest has been paid, it is deducted from the principal, and judgment rendered for the balance only. Code 1852, §§ 1519 - 1524.

Arkansas. The rate of legal interest is six per cent. Parties may agree in writing for the payment of interest not exceeding ten per cent. Any person paying a greater rate may recover the amount paid above the rate allowed in an action brought within one year. All usurious contracts are void; except bills of exchange or promissory notes, in the hands of an indorsee or holder who has received the same in good faith, and for a valuable consideration, without actual notice that such bill or note had been originally given for a usurious consideration or upon a usurious contract. Any person may be compelled to answer on oath any bill for the

There are innumerable ways and means resorted to for the purpose of evading these laws, and courts watch all contracts

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discovery of any sum of money paid on a usurious contract. Dig. of Stats. 1858, ch. 92, p. 621.

California. When there is no express contract in writing, fixing a different rate of interest, the rate allowed is ten per cent; but parties may contract in writing for any rate. Wood's Dig. 1858, p. 551.

Connecticut. The established rate of interest is six per per cent. If more is accepted, the party receiving it forfeits the amount so received, one half to him who shall prosecute to effect, and the other half to the treasury of the State; and in suits on usurious contracts, judgment is rendered for the amount originally lent, without interest. Compilation of 1854, p. 867. Under the statute of Connecticut it is held, in an action on a promissory note payable on time, and open to the objection of usury, that, while the defendant had the right under the statute to deduct from the principal the amount of the interest taken, and pay the balance in discharge of the obligation, yet that it is equally his legal duty to make such payment when the note falls due, and that the plaintiff is entitled to recover the usual damages, that is, the principal sum due, and six per cent interest thereon from the time the note falls due. Fisher *v.* Bidwell, 27 Conn. 363.

Delaware. The legal rate of interest is six per cent; and if any person take more, he forfeits a sum equal to the money lent, one half for the use of the person suing for the same, and the other half for the use of the State. R. S. 1852, ch. 63, p. 183.

Florida. Interest is not allowed above eight per cent; and when no rate of interest is expressed, no higher rate than six per cent can be charged. Any person accepting more than eight per cent forfeits the whole amount of interest due, one half to the county treasury and one half to the informer. The interest on usurious contracts is void. Thompson's Dig., p. 234.

Georgia. Lawful interest is at the rate of seven per cent. Contracts for more than that are void and of no effect, except so far as to authorize the recovery of the principal due thereon, and no more. Cobb's New Dig. 1851, p 393.

Illinois. The legal rate of interest is six per cent; but in all contracts, whether written or verbal, the parties may stipulate that ten per cent or less may be paid. If a greater rate than ten per cent is contracted for, the creditor can recover only the principal sum without interest. Compiled Statutes, 1858, Vol. I. p. 600.

Indiana. Interest is at the rate of six per cent. If a greater rate of interest is contracted for, the contract is not therefore void; but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, the defendant recovers costs; and the plaintiff recovers only his principal without interest; and if interest has been paid thereon, judgment is given for the principal, deducting interest paid. Illegal interest may be recovered back with ten per cent damages thereon by suit commenced within one year. Any person charged with taking illegal interest may be required to answer on oath in any civil proceeding. 1 R. S. 1852, ch. 57, p. 343.

Iowa. The rate of interest is six per cent, unless a different rate be expressed in writing. Code 1851, ch. 67, p. 149. The act of 1853, ch. 37, fixes the same rate, but allows the parties to agree in writing for a higher rate which may not be more than ten per cent. In any suit upon a contract in which a greater rate has been contracted for, ten per cent per annum thereon is forfeited to the school fund of the county, and the plaintiff has judgment for the principal without interest or costs. See Bacon *v.* Lee, 4 Iowa, 490.

which may be used or abused in this way with great strictness. So far as notes and bills are concerned, the principal and most

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Kansas. The legal rate of interest is ten per cent; but the parties may contract in writing for any rate, more or less. Laws of 1859, ch. 81, p. 487.

Kentucky. Legal interest is at the rate of six per cent. All contracts for a greater rate are void for the excess over the legal interest. If the lender refuse, before suit brought, a tender of the principal, with legal interest, he shall pay the costs of any suit brought on such contract or assurance. Chancery courts may grant relief for any excess of interest, and compel discovery; and such excess of interest may be recovered from the lender or forbearer, although the payment thereof was made to his assignee. R. S. 1852, ch. 53, p. 419.

Louisiana. All debts bear interest at the rate of five per cent from the time they become due, unless otherwise stipulated. The rate of conventional interest can in no case exceed eight per cent, under pain of forfeiture of the entire interest so contracted. If a higher rate is paid, the same may be sued for and recovered within a year. R. S. 1856, p. 269.

Maine. The legal rate of interest is six per cent. In actions upon contracts on which a greater rate of interest is reserved, the excessive interest is not recoverable; and if such excessive interest has been paid by any person, he may recover back the same within a year; but this provision does not extend to negotiable bills of exchange or promissory notes in the hands of an indorsee or holder, who received the same in good faith and for a valuable consideration, without notice of such excessive interest. R. S. 1857, ch. 45.

Maryland. The new Constitution of the State says: "The rate of interest in this State, shall not exceed six per cent per annum, and no higher rate shall be taken or demanded, and the Legislature shall provide, by law, all necessary forfeitures and penalties against usury." Art. 3, § 49. In Bandel *v.* Isaac, 13 Md. 202, it was held that this section does not of itself make the contract void; that the act of 1845, c. 352 remains in force; which provides that, unless the party seeking to avoid his liability for the excess above six per cent, specially plead and set out what is actually due, he will be responsible to the extent of the face of his contract.

Massachusetts. The rate of interest is six per cent. Contracts for a greater rate are not thereby void; but in an action on such contracts, the defendant recovers his full costs, and the plaintiff forfeits threefold the amount of the interest unlawfully reserved or taken. The party having paid usury, may recover back threefold the amount of the unlawful interest so paid, provided that the action shall be prosecuted within two years. Gen. Stats. 1860, p. 292. Under the Statute of Massachusetts, in an action upon a promissory note, on which usurious interest had been taken and reserved, it was held, that the interest reserved was to be computed to the time of the verdict and to be added to the principal; and that from this amount was to be deducted threefold the whole interest taken and reserved, computed as above. Parker *v.* Bigelow, 14 Pick. 436.

Michigan. The legal rate of interest is seven per cent, but the parties may stipulate in writing for the payment of any rate not exceeding ten per cent. Usurious contracts are not void; but in any action upon such contracts the plaintiff may have judgment for the principal and legal interest only, exclusive of the usury. But the indorsee or holder of negotiable promissory notes or bills of exchange, for a valuable consideration, before due, and without actual notice of the usury, is not affected thereby. 1 Compiled Laws, 1857, ch. 35, p. 424.

Minnesota. Any rate of interest agreed upon by parties in contract, specifying the

general question they present is, whether the consideration for which the note or bill is given is itself usurious. And perhaps the most interesting aspect of this question is that which arises

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same in writing, is legal and valid. When no rate of interest is agreed upon, or specified, seven per cent is the legal rate. Compiled Statutes, 1859, ch. 30, p. 424. By a statute of 1860 the rate of interest, which the parties may contract for, is limited to twelve per cent; and the excess above that rate is forfeited. See Statutes, 1860.

Mississippi. The legal rate of interest is six per cent, but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. If a greater rate of interest than ten per cent is stipulated for in any case, such excess is forfeited, on the plea of the party to be charged therewith. In Sadler *v.* Hoover, 31 Missis. 200, it was held that in the novation of a debt, the parties may legally contract for the same rate of interest which the old debt bore, although at the time of the novation the legal rate of interest was lower than that contracted for.

Missouri. The legal rate of interest is six per cent; but the parties may agree in writing for interest not exceeding ten per cent. In any action the defendant may show in his answer that illegal interest has been agreed for; and upon the jury so finding, judgment is rendered for the principal sum and interest at ten per cent; upon which judgment the court set apart the whole interest for the use of the common schools of the county. 1 R. S. 1855, ch. 85, p. 889.

New Hampshire. Interest is at six per cent. Every person receiving interest at a higher rate forfeits for every such offence three times the sum so received; and in an action upon a contract where a higher rate is reserved, three times the amount so secured is deducted from the sum lawfully due. Comp. Stats. 1853, p. 490.

New Jersey. The rate of interest is six per cent. If more is received, the principal sum is forfeited, one moiety to the State, and the other to the prosecutor. Any borrower may file a bill in chancery against the lender, and compel him to accept his principal, without interest, at any time before the action for the forfeiture is brought, and in that case the creditor is freed from the penalty. Nixon's Dig. 1855, p. 372.

New York. The rate of interest is seven per cent. Persons paying greater interest may recover back within one year the amount above the legal rate; and if such suit is not brought, then this sum may be recovered within three years by any overseer of the poor of the town where such payment has been made, or by any county superintendent of the poor of the county. Contracts reserving a greater rate of interest are void. Any person upon a bill of discovery exhibited against him, returning the excessive interest which he has taken, is discharged from further penalty. R. S. 1852, Vol. 2, p. 181, 4th ed.

North Carolina. No more than six per cent is allowed for interest. Persons taking more forfeit double the money or other property lent or forborne, one half to the State, and the other half to the prosecutor. All usurious contracts are void. R. C. 1854, p. 597, c. 114.

Ohio. The legal rate of interest is fixed at six per cent. In all actions for the recovery of money, all payments made by way of usurious interest are deemed, as to the excess above the legal rate, to be payments made on account of principal; and judgment may be rendered for the balance after deducting the excess of interest so paid. The parties, however, to any instrument in writing for the payment or forbearance of money, may stipulate therein for interest, at any rate not exceeding ten per cent; provided that no banking institution shall receive more than six per cent unless a higher rate is specified in its charter. R. S. 1854, c. 60, p. 486.

from the sale of notes, or upon the lending of credit by indorsement or guaranty, for a compensation.

To constitute a usurious transaction, there must be a loan; and there must be a usurious intent; (*b*) and both parties must

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Oregon. Ten per cent interest is allowed when no other rate is agreed upon. Stats. 1855, p. 532.

Pennsylvania. The established rate of interest is six per cent. Any person receiving more than this forfeits the principal, one half to the governor, for the support of government, and the other half to the person suing for the same. Purdon's Dig. 1857, p. 451. The reservation of an illegal rate of interest does not prevent a recovery of the sum actually loaned, with legal interest. Phila. & Sunbury R. R. Co. *v.* Lewis, 33 Penn. State, 33.

Rhode Island. Interest is computed at the rate of six per cent; and in any action upon a contract proved to be usurious, the plaintiff may recover the principal sum, with legal interest thereon. R. S. 1857, ch. 121.

South Carolina. The legal rate of interest is seven per cent; contracts for more are void, and any person taking usurious interest forfeits treble the money or property loaned or forborne, one half to the State, and the other to the informer. 4 Stats. at Large, p. 363.

Tennessee. The rate of interest is six per cent. A defendant sued for money may avoid the excess over legal interest by a plea setting forth the amount of the usury. Judgment is rendered for the principal and legal interest. If usurious interest has been paid, the same may be recovered back by the party paying it, or by a judgment creditor of such party. Code 1848, p. 398.

Texas. The legal rate of interest is fixed at eight per cent; but the parties may stipulate for any rate of interest not exceeding twelve per cent. All contracts for more than twelve per cent interest are void for the whole interest; but the principal sum may be recovered. Oldham & White's Dig. 1859, p. 242.

Vermont. Six per cent is the established rate of interest, and the person paying a greater rate may recover back the amount so paid above the legal interest, with interest thereon from the time of payment. Comp. Stats. 1850, ch. 76, §§ 3 – 5, p. 442.

Virginia. The legal rate of interest is six per cent, and contracts for a greater rate are void. The borrower may file a bill in equity, and compel the lender to discover on oath the terms of the loan; and if usurious, the lender recovers his principal without interest. Persons taking interest at a greater rate than is allowed by law forfeit double the money or property loaned or forborne, one half to the informer. Code, 1849, p. 575, ch. 141.

Wisconsin. The legal rate of interest is seven per cent; but parties may contract in writing for the payment of a rate not exceeding twelve per cent. Any person paying greater interest than thus allowed may recover back treble the amount of excess so paid, by an action brought within one year. All contracts reserving more than twelve per cent interest are valid to secure the principal sum, but no interest can be recovered. Any person taking illegal interest may be compelled to answer on oath any complaint for the discovery of any sum of money so taken. The party applying for relief, or setting up the plea of usury in any action instituted against him, must prove a tender of the principal sum.

(*b*) Pomeroy *v.* Ainsworth, 22 Barb. 118; Reed *v.* Coale, 4 Ind. 283, 288. "To constitute usury there must be a loan in contemplation by the parties; and a contract

concur in this intent; the borrower to give, and the lender to accept, usurious interest.(c) Thus, if there be no loan, but a *bona fide* sale of property, it is held that promissory notes may be given for the purchase money, bearing a rate of interest higher than the legal rate, without making the contract usurious.(d) But if both the loan and the intent exist in fact, it is enough, although they do not in form, of which we give many examples in our note; (e) and whether they exist in fact is a question for

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which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction." Per *Johnson*, J., in Nichols *v.* Fearson, 7 Pet. 103, 109. "Usury is mainly matter of intention." Per *Perkins*, J., Gale *v.* Grannis, 9 Ind. 140. "The ground and foundation of all usurious contracts is the corrupt agreement." Per *Gould*, J., in Murray *v.* Harding, 2 W. Bl. 859.

(c) Hayward *v.* Le Baron, 4 Fla. 404. See as to intent, Bank of United States *v.* Waggener, 9 Pet. 378; Lloyd *v.* Scott, 4 id. 205, 224; Agricultural Bank *v.* Bissell, 12 Pick. 586; Leavitt *v.* De Launy, 4 Comst. 364, 369; Keyes *v.* Moultrie, 3 Bosw. 1. As to loan, see Floyer *v.* Edwards, 1 Cowp. 112; Evans *v.* Negley, 13 S. & R. 218; State Bank *v.* Coquillard, 6 Ind. 232.

(d) Beete *v.* Bidgood, 1 Man. & R. 143, 7 B. & C. 453. Per *Littledale*, J.: "This is a contract for the sale of an estate, and not a loan of money." The plaintiff in effect said, You may have the estate for so much, cash. The purchaser says, No; I will pay by instalments. And the seller says, Then you shall pay at the rate of six per cent. In Tousey *v.* Robinson, 1 Met. Ky. 663, it was held that a note given in the purchase of land was not usurious, although bearing interest at the rate of eight per cent, this being more than the legal rate; for, say the court, the rate of interest was a part of the consideration of the purchase, and was not "for the loan or forbearance of money." But the contract for such interest must be made at the time. Mitchell *v.* Griffith, 22 Misso. 515 *Contra*, see Thompson *v.* Nesbit, 2 Rich. 73; Crawford *v.* Johnson, 11 Ind. 258. The statute of Indiana differs materially from the English statute.

(e) As where it is made the condition of granting a loan that the borrower shall take a lease of the lender at an exorbitant rent, the transaction is usurious. Saunders's Case, Shep. Touch. 62; Bedo *v.* Sanderson, Cro. Jac. 440. Or where a sum of money is paid the lender under the pretence of a salary. Scott *v.* Brest, 2 T. R. 238; Wright *v.* Wheeler, 1 Camp. 165, note. Or the services of a slave are given for the use of money, when these greatly exceed the legal rate of interest. Galloway *v.* Legan, 16 Mart. La. 167; Hamer *v.* Harrell, 2 Stew. & P. 323; Richardson *v.* Brown, 3 Bibb, 207; M'Ginnis *v.* Hart, 4 id. 327; Woodard *v.* Fitzpatrick, 9 Dana, 117. Or where a note is given for a larger sum than that actually loaned, with legal interest. Hyde *v.* Finley, 26 Missis. 468; Cunningham *v.* Hall, 7 Gray, 559; Saunders *v.* Lambert, id. 484; Keyes *v.* Moultrie, 3 Bosw. 1. The loaning of money at interest by a building association to such of its own stockholders as bid the highest premium for it is a new device of usurers in violation of law. Kupfert *v.* Guttenberg Building Ass., 30 Penn. State, 465. See also Chesterfield *v.* Janssen, 1 Atk. 301, 340; Lawley *v.* Hooper, 3 id. 278; Mansfield *v.* Ogle, 31 Eng. L. & Eq. 357; Dowdall *v.* Lenox, 2 Edw. Ch. 267; Clarkson *v.* Garland, 1 Leigh, 147; Steptoe *v.* Harvey, 7 id. 501; Brown *v.* Waters, 2 Md. Ch. 201; Wright *v.* McAlexander, 11 Ala. 236; Williams *v.* Williams, 3 Green, N. J. 1; Heytle *v.* Logan, 1 A. K. Marsh. 529; Brown *v.* Nevitt, 27 Missis. 801.

the jury.(*f*) And unless there is some evidence to go to the jury, the court is not justified in submitting the question of intent, because the transaction is *prima facie* one of good faith.(*g*) But after the facts are ascertained, it must depend upon the law whether they constitute a case of usury; and this must be a question for the court.

Even where the statute makes a usurious contract void, "to all intents and purposes," or absolutely and entirely null by the strongest phraseology, so that the note is void in the hands of an innocent indorsee as between him and the maker, the law would still be construed according to its intent, and its intent is to punish, and not protect the guilty party. So, although it be declared "void," in the strongest terms, yet the law regards it rather as "voidable." Hence no one can make the objection of usury but the borrower and those who are privies in interest and in contract with him. And therefore if the bargain be not disapproved by the party who is to pay the usury, it must be treated and enforced everywhere, and as against all other persons, as a valid contract.(*h*) If, therefore, A lend money usuriously, and take a negotiable note, and indorse this over to a party who discounts it for him, and A is sued upon it, he cannot object that the note is null and his indorsement void, because the indorsement is a new contract, depending in no respect upon the original consideration.(*i*)

(*f*) Harris *v.* Boston, 2 Camp. 348; Masterman *v.* Cowrie, 3 id. 488; Stevens *v.* Davis, 3 Met. 211; Freeman *v.* Brittin, 2 Harrison, 191; Mix *v.* Madison Ins. Co., 11 Ind. 117; Earll *v.* Mitchell, 22 Ill. 530; Brown *v.* Harrison, 17 Ala. 774; Carstairs *v.* Stein, 4 Maule & S. 192; Hutchinson *v* Hosmer, 2 Conn. 341; Andrews *v.* Pond, 13 Pet. 65, 77; Smith *v.* Brush, 8 Johns. 84; Tyson *v.* Rickard, 3 Harris & J. 109.

(*g*) Williams *v.* Reynolds, 10 Md. 57.

(*h*) See Knights *v.* Putnam, 3 Pick. 184. In accordance with this principle, it is held that a creditor, who has agreed with the principal debtor, without the consent of a surety, to extend the time of payment of a promissory note for a usurious consideration paid at the time, cannot avail himself of the usury, as rendering the agreement invalid, when the agreement, and the usurious consideration, are proved by the surety for the purpose of establishing a defence that he is discharged from his liability. See Draper *v.* Trescott, 29 Barb. 401, per *Strong*, P. J.

(*i*) Edwards *v.* Dick, 4 B. & Ald. 212; M'Knight *v.* Wheeler, 6 Hill, 492; Johnston *v.* Dickson, 1 Blackf. 256. In Edwards *v.* Dick, *supra*, *Abbott*, C. J., adverting to usurious contracts, said there was no case upon the statute of usury denying that a holder for valuable consideration may sue his immediate indorser.

So if a note is given, and the consideration, or a part of it, remitted in goods or stocks, it may be proved that the transaction was a mere cover for a usurious loan. And if the maker of the note proves that he was compelled to take the goods or stocks, and at a price far above their cash value, this discredits the transaction ; (*j*) but without some evidence of this kind, the burden is not upon the payee to prove that the goods were sold in good faith, or for their value, or that the transaction was not usurious.(*k*) If such a borrower sells the goods, he cannot keep

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(*j*) Wicks of Gloucestershire, cited in Reynolds *v.* Clayton, F. Moore, 398 ; Barker *v.* Vansommer, 1 Brown, Ch. 149 ; Lowe *v.* Waller, 2 Doug. 736 ; Pratt *v.* Willey, 1 Esp. 40 ; Davis *v.* Hardacre, 2 Camp. 375 ; Bank of U. S. *v.* Owens, 2 Pet. 527 ; Moore *v.* Vance, 3 Dana, 361 ; Stribbling *v.* Bank of the Valley, 5 Rand. 132 ; Morgan *v.* Schermerhorn, 1 Paige, 544 ; Ehringhaus *v.* Ford, 3 Ired. 522 ; Weatherhead *v.* Boyers, 7 Yerg. 545. In Lowe *v.* Waller, *supra*, where a person wanting to obtain money was induced to give his bill of £ 200 for goods worth only £ 120, Lord *Mansfield* said : "It is impossible to wink so hard as not to see that there was no idea between the parties of anything but a loan of money." So where a loan is made in stock at more than its market value. Doe *v.* Barnard, 1 Esp. 11. So if the sale of shares in an insurance company at par is made a condition of a loan, when the shares are in fact below par, the transaction is usurious. Eagleson *v.* Shotwell, 1 Johns. Ch. 536 ; and see also Rose *v.* Dickson, 7 Johns. 196 ; Pratt *v.* Adams, 7 Paige, 615 ; Archer *v.* Putnam, 12 Smedes & M. 286 ; Stribbling *v.* Bank of the Valley, 5 Rand. 132 ; Bank of the Valley *v.* Stribling, 7 Leigh, 26 ; Bank *v.* Arthur, 3 Gratt. 173. See per *Selden*, J., in Schermerhorn *v.* Talman, 14 N. Y. 93, 116. Whether the difference of the value for which the goods were taken and the price for which they were sold by the party taking them is so great as to make it apparent that they were taken only as a cover for usury is a question for the jury. Per Lord *Kenyon*, Rich *v.* Topping, 1 Esp. 176. The same principle holds even where separate securities are given for the loan and for the goods, and to different persons ; as where a person borrowed a sum of money of A, through an agent, and gave his note, and on the same occasion, but without the personal knowledge of A, purchased a span of horses belonging to the agent, and gave his note to the agent for the price, which was $ 175 more than the horses were worth, for the purpose of procuring the loan, the agent being a general one for the transaction of A's business, it was held that the transaction was usurious. Austin *v.* Harrington, 28 Vt. 130

(*k*) Rich *v.* Topping, 1 Esp. 176 ; Grosvener *v.* Flax and Hemp Manuf. Co., 1 Green's Ch. 453. Nor does the mere fact that a promissory note was given for an equal amount of bank-notes, whose market value was depreciated, amount to usury. Bank of U. S. *v.* Waggener, 9 Pet. 378. In this case, *Story*, J. said : "Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent ; *res ipsa loquitur*. But where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement, device, or shift to cover usury ; and that it was in the full contemplation of the parties." A different rule, however, prevails, where the transaction is attended with circumstances of suspicion. In Davis *v* Hardacre, 2 Camp. 375, per Lord *Ellenborough*, C. J. See also Coombe *v.* Miles 2 Ld

the price by proving usury; but must return, not the value they were put at to him, but the price he receives. If the borrower agrees to replace the stock borrowed on a certain day, together with the dividends paid in the mean time, it is not usury, although the dividends are expected to exceed, and do exceed, lawful interest; (*l*) or if the borrower agrees to replace the stock, with dividends, or pay the money it brought, with interest, this is not usurious; (*m*) but it is so if the lender retains this option. (*n*)

553; Hargreaves *v.* Hutchinson, 2 A. & E. 12. A promissory note for a certain sum, with interest from a day anterior to the date of the note, is not on the face of it usurious. Holden *v.* Pollard, 4 Pick. 173; Marvin *v.* Feeter, 8 Wend. 533.

(*l*) Per Lord *Kenyon* in Tate *v.* Wellings, 3 T. R. 531; Pike *v.* Ledwell, 5 Esp. 164; White *v.* Wright, 3 B. & C. 273; Wilson *v.* Kilburn, 1 J. J. Marsh. 494; Potter *v.* Yale College, 8 Conn. 52. In Forrest *v.* Elwes, 4 Ves. 492, £8,000 old South Sea annuities were loaned, the value at the time being £7,170, and a bond given by the borrower to replace the stock in six months, and in the mean time to pay lawful interest on £7,170. It was contended that the bond was, upon the face of it, a usurious contract; but the point was afterwards given up, and the Master of the Rolls decreed the bond good.

(*m*) Tate *v.* Wellings, 3 T. R. 531. The agreement in this case was that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which time the lender was to run the risk of the fall of the stocks; but he stipulated, that if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events, with such interest as the stock would have produced. This case overruled that of Moore *v.* Battie, 1 Amb. 371, in which a similar transaction was held usurious. In Pike *v.* Ledwell, 5 Esp. N. P. 164, and Maddock *v.* Rumball, 8 East, 304, agreements for the transfer of stock at a certain time, for the payment of loans, were held not to be usurious, inasmuch as the amount to be paid in stock depended upon a contingency, it being possible that the stock might fall in the mean time, so that the sum received would be less than the principal and interest would have amounted to. If stock is borrowed at a valuation above the market price, and it is agreed that lawful interest shall be paid on such valuation, the transaction is usurious, although the interest reserved might be no more than the stock will earn. Parker *v.* Ramsbottom, 5 Dow. & R. 138, 3 B. & C. 257, per *Abbott*, C. J.: "It appears to me that the agreement is clearly void for usury, because it secures to the plaintiff the sum of £10,083 15 *s.* as the value of the stock then remaining to be replaced, though the real value of that stock was then only £8,437 10 *s.*" If a loan is made in depreciated bank-notes, and the borrower has his option of returning them at the same rate at which he received them, this, it seems, prevents the transaction from being usurious. Caton *v.* Shaw, 2 Harris & G. 13; Curtis *v.* Leavitt, 17 Barb. 309.

(*n*) Barnard *v.* Young, 17 Ves. 44. For the principal and interest being secured, the creditor might take the opportunity of a rise in the stocks to make his election; and by electing to have it transferred at such a rise, he would be sure to be a gainer, while it was impossible that he could ever sustain any loss. Also Cleveland *v.* Loder, 7 Paige, 557. See also Smedley *v.* Roberts, 2 Camp. 607; Smith *v.* Nichols, 8 Leigh, 330. In White *v.* Wright, 3 B. & C. 273, *Bailey*, J. said: "A party may lawfully

If a note be given usuriously in payment of or as security for a pre-existing debt, which was wholly legal, the note will be affected by the usury, but the debt will not be.(*o*)

If the lender actually sustain loss or expense or any especial labor by reason of the loan, he may make a reasonable charge for this, and if this charge be included in the note so as to make it apparently usurious, it will not become really so.(*p*) So a commission merchant or agent may charge a commission for accepting bills or drafts for his principal.(*q*) So a broker, who is

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lend stock, as stock, to be replaced, or he may lend the produce of it, as money, or he may give the borrower the option to repay either in one way or the other. But he cannot legally reserve to himself a right to determine in future which it shall be." In Chippindale *v.* Thurston, Moody & M. 411, £500 was loaned, and the borrower agreed to repay it in three per cent consols, at a price not exceeding 68½ per cent, or to repay it in Bank of England notes upon six months' notice. The court ordered a nonsuit, on the ground that the option was with the lender, and the contract therefore clearly usurious, as he could not have less than five per cent interest, and might have more than the £500 lent, if the funds rose above 68½.

(*o*) Pollard *v.* Scholy, Cro. Eliz. 20; Ferrall *v.* Shaen, 1 Saund. 294; Ramsdell *v.* Soule, 12 Pick. 126; Johnson *v.* Johnson, 11 Mass. 359; Sheppard *v.* Hamilton, 29 Barb. 156; Hughes *v.* Wheeler, 8 Cowen, 77; Robinson *v.* Bland, 2 Burr. 1077; Gray *v.* Fowler, 1 H. Bl. 462; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; French *v.* Grindle, 15 Maine, 163; Farmer *v.* Sewall, 16 id. 456; Phillips *v.* Cockayne, 3 Camp 119; Wood *v.* Grimwood, 10 B. & C. 679. But the usurer cannot prove a security taken by him to be usurious, for the purpose of enabling him to resort to a prior obligation, which was the consideration of the usurious agreement. The usury can be set up only by the party for whose benefit the statute was passed; and afterwards the usurer may prove the validity of the original contract. La Farge *v.* Herter, 11 Barb. 159; s. c., on appeal, 5 Seld. 241, where *Ruggles*, C. J. said: "The borrower, therefore, may set up usury for the purpose of avoiding a contract tainted with it, but the lender cannot In respect to this question, usury must stand on the same footing as fraud." See Miller *v.* Kerr, 1 Bayley, 4; Draper *v.* Trescott, 29 Barb. 401.

(*p*) Stevens *v.* Davis, 3 Met. 211; Palmer *v.* Baker, 1 Maule & S. 56; Carstairs *v.* Stein, 4 id. 192; Fussell *v.* Daniel, 10 Exch. 581, 29 Eng. L. & Eq 369; Ex parte Jones, 17 Ves. 332. And see Hammett *v.* Yea, 1 Bos. & P. 144; Matthews *v.* Griffiths, Peake, 200, as to discounting and selling bills. In Hine *v.* Handy, 1 Johns. Ch. 6, the lender charged $19.28 for his trouble in going to another county to procure the amount loaned, and this extra amount was included in the bond; and as this compensation was made a condition of the loan, it was held usurious. But if the lender charge for "extra trouble," in lending his own money or in buying of the borrower the borrower's own note, such charge will be allowed only on clear allegation and proof of the actual and *bona fide* sacrifice of time, money, or property, for the benefit of the borrower, or for his accommodation. Per *Woodruff*, J., in Storer *v.* Coe, 2 Bosw. 661. See Lockwood *v.* Mitchell, 7 Ohio State, 387, 406. A stipulation of a certain percentage besides interest, for collection fees, is usurious. State *v.* Taylor, 10 Ohio, 378; Shelton *v.* Gill, 11 id. 417.

(*q*) Snydam *v.* Bartle, 10 Paige, 94; Trotter *v.* Curtis, 19 Johns. 160; Snydam *v.* Westfall, 4 Hill, 211; De Forest *v.* Strong, 8 Conn. 513; Brown *v.* Harrison, 17 Ala.

the agent of the maker, or a banker who remits the bill, may charge his commission; and even if he charge an exorbitant or oppressive commission, but wholly without the privity or participation of the maker, it is not usury.(*r*)

We have said there must be usurious intent. If, therefore, more than legal interest is taken or charged by error of calculation, or by any other mistake of fact, this works no forfeiture of the principal or the legal interest.(*s*) But if the error be a mis-

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774. Such a charge is but a legal compensation for the benefit of the acceptor's name and credit, and in consideration of his risk, and is not regarded as interest. Lalande *v* Breaux, 5 La. Ann. 505; De Forest *v.* Strong, *supra.* But a factor cannot charge a commission of two and a half per cent for advancing, in addition to the highest rate of conventional interest, for the loan of money. Lalande *v.* Breaux, *supra;* Haven *v.* Hudson, 12 La. Ann. 660; and see Harris *v.* Boston, 2 Camp. 348. And in Jones *v.* McLean, 18 Ark. 456, it is held that a like charge for paying such drafts at maturity is regarded as interest on the money advanced; and if the commission and interest together amount to more than the legal rate of interest, it will be deemed usury. See also Segond *v.* Thomas, 10 La. 295.

(*r*) Dagnall *v.* Wigley, 11 East, 43; Barretto *v.* Snowden, 5 Wend. 181. In Coster *v.* Dilworth, 8 Cowen, 299, the borrower paid a broker three per cent per month for procuring the loan; but this was held not to be usurious, upon the ground that the person advancing the money received no more than legal interest. See also Hetfield *v.* Newton, 3 Sandf. Ch. 564; Crane *v.* Hubbel, 7 Paige, 413. So a broker or agent may charge a commission for the purchase of a ship, and also take legal interest on his own money advanced towards the purchase. Ship Panama, Olcott, Adm. 343. And so, even if the vessel was not sold, the commission not being a cover for usury. Bartlett *v.* Williams, 1 Pick. 288. And an agreement made by a borrower with the agent of the lender, that the agent shall have a commission for making the loan, does not render the transaction usurious, if made without the knowledge of the lender, and is in no respect for his benefit. Condit *v.* Baldwin, 21 Barb. 181. But wherever the lender participates in such commission, the transaction is usurious. Wilkerson *v.* The State, 2 Cart. Ind. 546. Where a borrower employed an agent to procure a loan of $4,000 for him, and agreed to pay him $300 commission for so doing, and the agent in effecting the loan paid $200 to the lender, retaining $100 himself, the borrower receiving $3,700 and giving his note for $4,000, it was held that the transaction was a mere cover for usury, and that the compensation nominally allowed to the agent was really allowed to enable him to accomplish the object of borrowing the money, by paying to the party loaning it an extra compensation for its use. Collamer *v.* Goodrich, 30 Vt. 628. So if the discounter of a bill engage with the holder that he shall pay the agent procuring the discount a premium, though he himself receive no part of it, this is usurious. Meagoe *v.* Simmons, Moody & M. 121. And where a broker receives extra compensation for a loan, without disclosing the fact of his agency, the loan is usurious. Commonwealth *v.* Frost, 5 Mass. 53. And so where a person, being requested to procure a note to be discounted, did so by placing his own name on it as indorser, and retained $30 for his indorsement and trouble, this was held usurious. Steele *v.* Whipple, 21 Wend. 103.

(*s*) N. Y. Firemen Ins. Co. *v.* Sturges, 2 Cowen, 664; Marvine *v.* Hymers, 2

take as to the legal rights of the party; that is, if he knew he took more than interest, but supposed that the circumstances gave him a legal right to take it, this is usurious, because every man is supposed to know the law.(*t*)

If the borrower takes upon himself any real risk of loss, other than that of the insolvency of the maker, it is not usury; (*u*)

Kern. 223; McElfatrick *v.* Hicks, 21 Penn. State, 402. In Conger *v.* Tradesman's Bank, Hill & Denio, 34, where a bank in discounting a note payable at ninety days, deducted ninety-three days discount, though in point of fact it was payable in ninety-two days, the third day of grace accidentally falling on Sunday, it was held not to be usury if the bank did not knowingly agree for more than legal interest; and further the calling the odd cents above fifty a dollar, according to the practice of the bank, was held not objectionable, on the principle *de minimis non curat lex*. See also Buckley *v.* Guildbank, Cro. Jac. 678, 2 Rol. 414; Nevison *v.* Whitby, Sir W. Jones, 396, Cro. Car. 501; Glasfurd *v.* Laing, 1 Camp. 149; Lloyd *v.* Scott, 4 Pet. 224, per *McLean*, J.; N. Y. Firemen Ins. Co. *v.* Ely, 2 Cowen, 678; Busby *v.* Finn, 1 Ohio State, 409; Gibson *v.* Stearns, 3 N. H. 185; Livingston *v.* Bird, 1 Root, 303.

(*t*) It is quite well settled that there need not be proof that the agreement was corrupt in the intention of the parties, because it may be usurious, though the parties did not know that it was contrary to law. Thompson *v.* Nesbit, 2 Rich. 73; Marsh *v.* Martindale, 3 Bos. & P. 154, 159; Higgins *v.* Mervin, as cited in Roberts *v.* Trenayne, Cro. Jac. 507. See also Davis *v.* Hardacre, 2 Camp. 375; Doe *v.* Barnard, 1 Esp. 11; Childers *v.* Deane, 4 Rand. 406. The taking of more than lawful interest, under the supposition that it was permitted by a usage of trade or a custom of merchants, is usury. Ex parte Aynsworth, 4 Ves. 678; Dunham *v.* Gould, 16 Johns. 367. So where an excess of interest was intentionally taken by a bank, upon a mistaken supposition that banks were privileged to a certain extent. Maine Bank *v.* Butts, 9 Mass. 49. In Reed *v.* Coale, 4 Ind. 283, where a note bearing ten per cent interest, which was allowed at the date of its execution, was given up, and a new note bearing the same interest was taken after the enactment of the statute prohibiting the taking of more than six per cent, it was insisted by counsel that, inasmuch as the evidence showed that the taking of the new note was in good faith, and was, as the parties supposed, merely a continuation of a pre-existing valid contract, it was not subject to the taint and penalty of usury. But the court held that the taking of unlawful interest having been shown, the corrupt intent was a presumption of law, which could not be rebutted by any proof of honest intentions. "A man might as well be allowed to show that he had violated any other positive statute with a good design." The calculating interest on 360 days as a year is said to be usury, without any other evidence of corrupt intention. Bank of Utica *v.* Wager, 2 Cowen, 712, 8 id. 398; Utica Ins. Co. *v.* Tillman, 1 Wend. 555; State Bank *v.* Cowan, 8 Leigh, 253. But see *contra*, Agricultural Bank *v.* Bissell, 12 Pick. 586; Bank of St. Albans *v.* Scott, 1 Vt. 426 It is now provided by statute in New York and some other States that interest may be calculated in this manner. 2 R. S. of N. Y., p. 58, and see *infra*, p. 422, as to the use of Rowlett's tables, which proceed on this assumption. To same effect see Lyon *v.* State Bank, 1 Stew. 442; Planters' Bank *v.* Snodgrass, 4 How. Miss. 573; Duvall *v.* Farmers' Bank, 7 Gill & J. 44; Duncan *v.* Maryland Savings Institution, 10 id. 299.

(*u*) Hall *v.* Daggett, 6 Cowen, 653; Quackenbush *v.* Leonard, 9 Paige, 334; Pomeroy *v.* Ainsworth, 22 Barb. 118, per *Paige*, J.: "It is essential to the nature of a loan

and upon this principle loans on bottomry and *respondentia* rest; for then, if the ship or the cargo be lost, the principal sum loaned is lost.(*v*)

The same principle is applied to some contracts which are not maritime; as if one buys an annuity or a rent-charge at an exorbitant price, and gives his note for it, he cannot object that it was usury.(*w*) And if the purchaser of an annuity secure his loan by an insurance on the grantor's life, this is not usury.(*x*)

So if a borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and, if he fail to do so, so much more by way of penalty, even if it be called extra interest, this is not such usury as would affect the contract, because the borrower has the right to pay the principal and

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that the thing lent is at all events to be returned." Cummings *v.* Williams, 4 Wend. 679; Spencer *v.* Tilden, 5 Cowen, 144; Hall *v.* Haggart, 17 Wend. 280; Leavitt *v.* De Launy, 4 Comst. 364, 372. On this principal, a note payable "in Baltimore bank-notes" at more than legal interest, was held not usurious. Stevenson *v.* Unkefer, 14 Ill. 103. For loans depending upon the uncertainty of life, see Burton's Case, 5 Coke, 69, Clayton's Case, id. 70; Button *v.* Downham, Cro. Eliz. 643; Bedingfield *v.* Ashley, id. 741; Long *v.* Wharton, 3 Keble, 304. And for *post-obit* contracts, see Chesterfield *v.* Janssen, 1 Atk. 301, 2 Ves. Sr. 125, 1 Wils. 286; Batty *v.* Lloyd, 1 Vern. 141; Lamego *v.* Gould, 2 Burr. 715; Matthews *v.* Lewis, 1 Anstr. 7.

(*v*) Soome *v.* Gleen, Sid. 27; Chesterfield *v.* Janssen, 1 Wils. 286, 1 Atk. 301, 348, 2 Ves. Sr. 125, 148; Roberts *v.* Trenayne, Cro. Jac. 507, per *Doderidge*, J.; The Sloop Mary, 1 Paine, C. C. 671; Rucher *v.* Conyngham, 2 Pet. Adm. 295; Sharpley *v.* Hurrel, Cro. Jac. 208; Thorndike *v.* Stone, 11 Pick. 183.

(*w*) Roberts *v.* Trenayne, Cro. Jac. 507; The King *v.* Evans, 1 Keble, 242; Doe *v.* Brown, Holt, N. P. 295; Fuller's Case, 4 Leon. 208; Symonds *v.* Cockerill, Noy, 151; Richards *v.* Brown, 2 Cowp. 770; Mansfield *v.* Ogle, 24 Law J., N. S., ch. 450, 31 Eng. L. & Eq. 357.

(*x*) Lawley *v.* Hooper, 3 Atk. 278; In re Naish, 7 Bing. 150. Even if the vendor has the option to repurchase at a certain sum, and though the effect would be to give to the purchaser a greater rate of compensation for his money than the legal rate of interest, it is not usurious unless it is a mere device to cover a usurious loan. Lloyd *v.* Scott, 4 Pet. 205. And see Doe *v.* Gooch, 3 B. & Ald. 665. See Chesterfield *v.* Janssen, 1 Atk. 301, 340, 1 Wils. 286, per *Burnett*, J. Where the contingency upon the annuity is so slight as to be merely an evasion, it is deemed colorable only, and the transaction is usurious. Per Lord *Mansfield*, in Richards *v.* Brown, *supra*. But the case of an annuity for years is placed upon the same footing as any other contract to pay a certain number of instalments; and the principle asserted is, that, whenever it appears on the face of the transaction that at the close of all the payments more than the sum advanced, with legal interest thereon, will have been returned, the contract is usurious. See remarks of *Bayley*, J., in Doe *v.* Gooch, 3 B. & Ald. 664; Fereday *v.* Wightwick, 1 Russ. & M. 45; Ferguson *v.* Sprang, 1 A. & E. 576; Chillingworth *v.* Chillingworth, 8 Simons, 494.

avoid the penalty.(*y*) We should say, however, that if he did not pay the principal, nothing more than that, with lawful interest, could be recovered from him.

Nor will a subsequent taking of more than lawful interest be conclusive evidence of an original usurious bargain, and not necessarily of even a usurious payment.(*z*) But if wholly unexplained, it would be presumptive evidence of an original usurious contract, and very strong evidence of a usurious payment under a usurious contract made at the time.(*a*)

A borrower, upon returning a sum legally borrowed, may make a voluntary gift, either of money or of a chattel, to the lender; and if the gift be not made in pursuance of any former promise, there is no usury in this.(*b*)

Nor is it necessarily usurious for a party, in making a further

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(*y*) The rule is so laid down by *Doderidge*, J., in Roberts *v.* Trenayne, Cro. Jac. 507. In accordance with this rule see Cutler *v.* How, 8 Mass. 257; Moore *v.* Hylton, 1 Dev. Eq. 429; Tuttle *v.* Clark, 4 Conn. 153; Thompson *v.* Jones, 1 Stew. 556; Jordan *v.* Lewis, 2 id. 426; Wight *v.* Shuck, 1 Morris, 425, in which case a note, payable two years after date, was to bear interest at fifty per cent from the time it was due until paid. Judy *v.* Gerard, 4 McLean, 360; Fisher *v.* Otis, 3 Chand. 83; Wells *v.* Girling, 4 J. B. Moore, 78, Gow, 21; Burton's Case, 5 Co. 69; Long *v.* Storie, 9 Hare, 542, 10 Eng. L. & Eq. 182; Floyer *v.* Edwards, 1 Cowp. 112; Shuck *v.* Wight, 1 Greene, Iowa, 128; Gambril *v.* Rose, 8 Blackf. 140; Lawrence *v.* Cowles, 13 Ill. 577; Pollard *v.* Baylors, 6 Munf. 433; Call *v.* Scott, 4 Call, 402. And so an agreement that, upon failure to pay any instalment of interest upon a promissory note, the whole debt shall be due and collectible, and the maker shall pay all attorneys' fees, and other costs and charges incurred in its collection, is not usurious. Billingsley *v.* Dean, 11 Ind 331.

(*z*) Fussil *v.* Brookes, 2 Car. & P. 318; Hammond *v.* Smith, 17 Vt. 231; Frye *v.* Barker, 1 Pick. 267; Gardner *v.* Flagg, 8 Mass. 101; Thompson *v.* Woodbridge, id. 256.

(*a*) Ferrall *v.* Shaen, 1 Saund. 295, note; Catlin *v.* Gunter, 1 Kern. 368; Cummins *v.* Wire, 2 Halst. Ch. 73; Leavitt *v.* De Launy, 4 Comst. 364; Williams *v.* Reynolds, 10 Md. 57; N. Y. Firemen Ins. Co. *v.* Ely, 2 Cowen, 705; Varick *v.* Crane, 3 Green, Ch. 128; Quarles *v.* Brannon, 5 Strobh. 151. Such subsequent taking is presumption only of a new usurious contract, according to Hammond *v.* Smith, 17 Vt. 231.

(*b*) Storer *v.* Coe, 2 Bosw. 661. See Cummins *v.* Wire, 2 Halst. Ch. 73; Quarles *v.* Brannon, 5 Strobh. 151. In Nichols *v.* Lee, 3 Anstr. 940, where to debt upon a bond the plea was, that, after the execution of the bond, the plaintiff received from the defendant more than lawful interest. *Macdonald*, C. B. said: "There is nothing more settled than this point: to avoid a security as usurious, you must show that the agreement was illegal from its origin." See cases cited *supra*, note *v*. A borrower cannot by an act of generosity, real or contrived, render that corrupt and usurious which was not so by its terms, and which was not so designed by the lender. Per *Pierrepont*, J., in Keyes *v.* Moultrie, 3 Bosw. 1.

loan, to insist upon security for a former loan, even if the giving of such security be made a condition of the new loan.(*c*)

If A owes a note to B, which is usurious, and transfers in payment to B a valid debt due to A from C, C cannot defend himself when B sues him (either in his own name if the transferred debt were negotiable, or in A's name if it were not) by showing that the consideration or the contract as between A and B, was usurious.(*d*) Because the defence of usury can only be set up by the party to the contract, or by some one standing in legal privity with him.(*e*) And the penalty for taking usury can be recovered only of the usurer, and not of his agent or any middleman.(*f*)

And if A lends money to B usuriously, and takes B's note and

(*c*) Jarvis's Appeal, 27 Conn. 432.

(*d*) Marchant *v.* Dodgin, 2 Moore & S. 632; Parr *v.* Eliason, 1 East, 92; Knights *v.* Putnam, 3 Pick. 184; Conwell *v.* Pumphrey, 9 Ind. 135; Bush *v.* Livingston, 2 Caines, Cas. 66; Braman *v.* Hess, 13 Johns. 52; Munn *v.* Commission Co., 15 id. 44; Littell *v.* Hord, Hardin, 81; Bearce *v.* Barstow, 9 Mass. 45; Lowell *v.* Johnson, 14 Maine, 240; Little *v.* White, 8 N. H. 276; Reading *v.* Weston, 7 Conn. 409; Green *v.* Morse, 4 Barb. 332; Clapp *v.* Hanson, 15 Maine, 345. "So far as the assignment operates as a transfer of the note to the assignee, it is neither void or voidable." Conwell *v.* Pumphrey, *supra*, and Knights *v.* Putnam, *supra*. In Stanley *v.* Kempton, 30 Maine, 118, Butler held three notes against Bangs, which were usurious. Bangs being called upon to pay, procured the defendant to give the note in suit, in payment of the three original notes, which were given up. The court held the last note to be a payment, and not a substitute for the other notes, and therefore valid.

(*e*) Per *Strong*, P. J., in Draper *v.* Trescott, 29 Barb. 401; Dix *v.* Van Wyck, 2 Hill, 522. Per *Bronson*, J.: "A mere stranger, or one who has no legal interest in the question, shall not officiously intermeddle in the matter, and take advantage of a statute which was not made for his benefit." See also Reading *v.* Weston, 7 Conn. 409. The case of Harrison *v.* Hannel, 5 Taunt. 780, recognizes the right of a collateral surety to avail himself of usury in the original transaction, when the contract of the collateral was wholly unaffected by usury. A surety to a note may make use of this defence. Austin *v.* Fuller, 12 Barb. 360; Morse *v.* Hovey, 9 Paige, 197; Safford *v.* Vail, 22 Ill. 327; Gray *v.* Brown, 22 Ala. 262. Or a judgment creditor. Jackson *v* Tuttle, 9 Cowen, 233. Or an accommodation indorser. Gray *v.* Brown, 22 Ala. 262; Dunscomb *v.* Bunker, 2 Met. 8. See *infra*, p. 416, note *i*. Or a guarantor of the debt. Huntress *v.* Patten, 20 Maine, 28.

(*f*) Kimball *v.* Proprietors of the Boston Athenæum, 3 Gray, 225. "The plaintiff was indebted to the defendants in the sum of $100,000, on a note payable on demand, with interest semiannually, and secured by mortgage of his real estate. The defendants wanted the money, and the plaintiff did not want to pay it. An agreement was made to this effect: That the plaintiff should give the defendants his negotiable promissory notes to an amount not exceeding $40,000; that the defendants should get the notes discounted, on such terms and for such rates of interest as they saw fit, and apply the proceeds to their use. When the notes arrived at maturity, the defendants were to take them up, and call upon the plaintiff, if they saw fit, for other notes to be dis-

mortgage to secure it, and assigns this to C, who sues B on the note, although the usury may be a good defence to the note, B cannot claim the mortgaged property without payment of the actual sum borrowed by him, with lawful interest.(*g*) Generally, if a debtor in any way or form make himself a plaintiff on some ground of usury, it seems to be held, not only in equity but at law, that he must pay or tender the sum borrowed, with lawful interest, before he can have relief.(*h*)

If there be two promissory notes, and by one the borrower agrees to pay the sum actually borrowed, with lawful interest, and by another he promises to pay additional interest, this last note is certainly affected with usury; (*i*) but whether the first is,

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posed of in the same manner. The plaintiff was to continue to pay the legal interest upon his own note of $ 100,000 to the defendants, and to pay all sums of money which the defendants had to pay to others in the negotiation and disposition of the notes of the plaintiff, beyond the legal rates of interest." Different sums were paid to the defendants under this arrangement, and the present action was a bill to recover of them threefold the amount of the unlawful interest paid to the defendants, under the statute against usury. "When such greater rate of interest has been paid, the party paying the same may recover it back. And from whom? Obviously from him to whom it has been paid, — from the usurer. The plaintiff paid no unlawful interest to the defendants. They received their six per cent, and no more. The bargain was no more than this: 'Take these notes of mine, get them discounted at the best rates you can, and account with me for the proceeds. If there is a loss, I will sustain it.' The defendants neither lent the money, nor participated in any manner, direct or indirect, in the profits of the usury. They were in effect the agents of the plaintiff for the transaction of the business, for his accommodation, and without compensation." Per *Thomas*, J.

(*g*) Eagleson *v.* Shotwell, 1 Johns. Ch. 536; Ruddell *v.* Ambler, 18 Ark. 369; Hunt *v.* Acre, 28 Ala. 580; Pearson *v.* Bailey, 23 id. 537. So of a subsequent grantee of the premises. Post *v.* Bank of Utica, 7 Hill, 391.

(*h*) Scott *v.* Nesbit, 2 Brown, Ch. 641; Rogers *v.* Rathbun, 1 Johns. Ch. 367; Tupper *v.* Powell, id. 439; Fulton Bank *v.* Beach, 1 Paige, 429; Morgan *v.* Schermerhorn, id. 544; McDaniels *v.* Barnum, 5 Vt. 279; Jordan *v.* Trumbo, 6 Gill & J. 103; Thomas *v.* Mason, 8 Gill, 1; Day *v.* Cummings, 19 Vt. 496; Ballinger *v.* Edwards, 4 Ired. Eq. 449; Phelps *v.* Pierson, 1 Greene, Iowa, 121; Wilson *v.* Hardesty, 1 Md. Ch. 66; Ruddell *v.* Ambler, 18 Ark. 369; Noble *v.* Walker, 32 Ala. 456; Fanning *v.* Dunham, 5 Johns. Ch 122, 143. See also Hindle *v.* O'Brien, 1 Taunt. 413; Roberts *v.* Goff, 4 B. & Ald. 92. In Virginia, this rule is qualified to the extent that the debtor, where he is plaintiff, and seeks to set aside a contract on account of usury, will only be required to pay the principal debt without any interest. Young *v.* Scott, 4 Rand. 415; Clarkson *v.* Garland, 1 Leigh, 147; Turpin *v.* Povall, 8 id. 93; Marks *v.* Morris, 4 Hen. & M. 463. See also Boone *v.* Poindexter, 12 Smedes & M. 640. These cases were made to rest upon the fact that the borrower came into equity seeking no discovery of usury from the lender, but establishing it by other proof.

(*i*) Holland *v.* Chambers, 22 Ga. 193; Goodrich *v.* Buzzell, 40 Maine, 500; Gray *v.* Brown, 22 Ala. 262. When the different securities together form one contract, they

may not be so certain. The authorities are not reconcilable. We think it must be a question of fact rather than of law. If the two bargains are distinct in substance and in fact; as, if there be a previous debt, for which an unobjectionable note is given, and then, by distinct agreement, another note is given for usurious interest, this note alone should be affected. But it would be absurd to permit the usury laws to be evaded by so easy and transparent a contrivance as that of giving two notes instead of one, where the bargain was entire. It is indeed settled, that if there be a note, and a separate oral promise to pay usurious interest, the note itself is affected with usury.(*j*)

The law opposes usury by two penalties, which are quite distinct. The one is, avoidance of the contract; the other is, a forfeiture for breach of the law. But the forfeiture is not incurred until usurious interest is paid, and so the act of usury completed; although the contract may in the mean time be avoided.(*k*)

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are both tainted with usury. Roberts *v.* Trenayne, Cro. Jac. 507; White *v.* Wright, 3 B. & C. 273. See also Clark *v.* Badgley, 3 Halst. 233; Swartwout *v.* Payne, 19 Johns. 294; Motte *v.* Dorrell, 1 McCord, 350. Where notes were given for the purchase-money of real estate, drawing six per cent interest, the legal rate, and secured by a mortgage, and other notes were given for two per cent upon the whole amount, so as to reserve eight per cent interest, it was held, in a suit to foreclose the mortgage, after the notes for the two per cent had been paid, that the mortgagor could set up the defence of usury. The transaction was all one. Crawford *v.* Johnson, 11 Ind. 258; see also Flemming *v.* Mulligan, 2 McCord, 173.

(*j*) Atwood *v.* Whittlesey, 2 Root, 37; Merrills *v.* Law, 9 Cowen, 65. It seems that a party may show an agreement, by parol, to pay an additional sum at some future day, as interest on a note or bond on which lawful interest is reserved; and the note will thus be rendered usurious and void. Lear *v.* Yarnel, 3 A. K. Marsh. 419. In this case the court say: "It is true that the verbal contract would, independent of the statute, be merged in the written agreement, and, being inconsistent therewith, parol evidence would be inadmissible to prove it. But if we are correct in supposing the written agreement to be void under the statute, in consequence of the illegality of the verbal contract, it is obvious that the latter cannot be merged in the former, for it is only in virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded, and, of course, when it has no obligation it can have no such effect." So also Levy *v.* Brown, 6 Eng. Ark. 16; Austin *v.* Fuller, 12 Barb. 360; Willard *v.* Reeder, 2 McCord, 369. *Contra*, Butterfield *v.* Kidder, 8 Pick. 512.

(*k*) Pearson *v.* M'Gowran, 3 B. & C. 700, 5 Dowl. & R. 616; Loyd *v.* Williams, 3 Wils. 253; Fisher *v.* Beasley, 1 Doug. 232; Lowe *v.* Waller, 2 id. 736; Ferrall *v.* Shaen, 1 Saund. 295, note by Serj. Williams; Maddock *v.* Hammett, 7 T. R. 184; Wright *v.* Laing, 3 B. & C. 165; Clark *v.* Badgley, 3 Halst. 233; Thomes *v.* Cleaves, 7 Mass. 361; Oyster *v.* Longnecker, 16 Penn. State, 269; Livingston *v.* Indianapolis

On the other hand, if the contract be in form free from usury, and enforcible, if usurious interest be subsequently paid on this contract, the forfeiture is incurred.(*l*)

Whether, if the usurious interest be payable at successive periods, more than one penalty is incurred, may not be quite certain on the authorities. But the latest English authorities hold what we take to be the better doctrine; namely, that but one penalty can be incurred upon one loan, although the loan provide for successive instalments.(*m*)

In this country, our State statutes do not, generally at least, make a note void for usury. If they do, it must be void (except against the indorser, as above stated) in the hands of an innocent holder for value.(*n*) And if this holder, on discovering

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Ins. Co., 6 Blackf. 133; Stevens *v.* Lincoln, 7 Met. 525. In Fisher *v.* Beasley, *supra*, Lord *Mansfield* said: "It became material in this case to determine when the usury was complete. One side contended that it was so upon the payment of the premium, and I long inclined to that opinion, because it was paid *eo nomine* as above legal interest. But I am now satisfied, as we all are, that the offence was not complete till the half-year's interest was received. There are two branches of the statute. Under the first, every agreement, contract, and security for more than legal interest is void. Therefore the bond given to the defendant in this case was void. But under the second, the penalty is incurred only by *taking, accepting,* and *receiving* more than legal interest. All the authorities lean this way, both ancient and modern." In Simpson *v.* Warren, 15 Mass. 460, where the defendant had discounted a note for $400, at the rate of two per cent per month, which was unpaid at the time this action for the penalties was brought, it was held that no usury had been committed. In Wade *v.* Wilson, 1 East, 195, £600 being due from G. to the defendant, ten guineas were paid by G. to the defendant, by way of premium, for the defendant's forbearance for one year, and G. executed his note to the defendant for £600, at 5 per cent. A half-year's interest of £15 was afterwards received by the defendant upon the note, and it was held that upon this payment usury was committed. In Commonwealth *v.* Frost, 5 Mass. 53, the court said it was clear "that the taking of the sixteen dollars, as the compensation of the loan, that sum exceeding lawful interest, completed the offence of usury, whether the principal sum was ever paid or not." See Wood *v.* Grimwood, 10 B. & C. 679.

(*l*) Dixie's Case, 1 Leon. 95; Gardner *v.* Flagg, 8 Mass. 101; Thompson *v.* Woodbridge, id. 256; Chadbourn *v.* Watts, 10 id. 124; Radley *v.* Manning, 3 Keble, 142, pl. 13; Abrahams *v.* Bunn, 4 Burr. 225; Floyer *v.* Edwards, 1 Cowp. 112, per Lord *Mansfield*, C. J.

(*m*) See Wood *v.* Grimwood, 10 B. & C. 679, per *Parke*, J. The contrary was held in Lamb *v.* Lindsey, 4 Watts & S. 449, *Kennedy*, J. dissenting and adopting the views of *Parke*, J., in the case cited above.

(*n*) Lowe *v.* Waller, 2 Doug. 739; Lowes *v.* Mazzaredo, 1 Stark. 385; Chapman *v.* Black, 2 B. & Ald. 588; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66, 206; Churchill *v.* Suter, 4 Mass. 156, 161; Bridge *v.* Hubbard, 15 Mass. 96; Wynne *v.* Callander, 1 Russ. 293; Preston *v.* Jackson, 2 Stark. 237; Amory *v.* Meryweather, 2 B. & C. 573, 4 Dow. & R. 86; Pearson *v.* Bailey, 23 Ala. 537; Payne *v.* Trezevant, 2 Bay, 23.

the taint of usury, took a new note and gave up the former, the new note was also void. But if such holder, who is not a party to the original usurious contract, give up the original security and take another without any knowledge of the usury, such substituted security is valid.(*o*) The statute of 58 Geo. 3, ch. 93, altered this.(*p*) And the statutes of some of our States also provide, in a similar manner, that the penalties against usury shall not extend to negotiable paper in the hands of an innocent holder or indorsee.(*q*)

Townsend *v.* Bush, 1 Conn. 260. But otherwise when the statute of usury does not declare the contract void. See Fleckner *v.* U. S. Bank, 8 Wheat. 354; Creed *v.* Stevens, 4 Whart. 223; Young *v.* Berkley, 2 N. H. 410; Tucker *v.* Wilamowicz, 3 Eng. 157; Wells *v.* Porter, 5 B. Mon. 416; Conkling *v.* Underhill, 3 Seam. 388. In Massachusetts, however, it is held that usury between the payee and maker of a promissory note is a good defence for the latter, *pro tanto,* to the note in the hands of a *bona fide* indorsee under the statute subjecting the plaintiff, in an action upon a usurious contract, to a forfeiture of threefold the amount of the whole interest unlawfully reserved or taken. Kendall *v.* Robertson, 12 Cush. 156. *Shaw,* C. J. said: "Were this a new provision, there might be a doubt whether it was not the intention of the legislature to impose the forfeiture on the offending party, the original party to the prohibited contract, and not upon an innocent indorsee. But the language of the statute is very explicit, and applies to the contract whenever an action is brought on it, and extends the forfeiture, not to the usurious lender, not to the promisee in the original contract only, but to 'the plaintiff' in any action brought on any such contract. And this construction is strictly analogous to that applied to the former law, but is less penal. The former law made the contract void; in other words, declared the whole money so lent upon usury forfeited; the present law declares it forfeited only in part. The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee; the natural conclusion is, in the absence of express words, changing the operation of the law, that it was the intention of the legislature to extend such partial forfeiture in like manner, and attach it, as before, to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same: to discourage and suppress a mode of lending, regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequences to the contract itself, whenever set up as proof of a debt."

(*o*) Cuthbert *v.* Haley, 8 T. R. 390, *Le Blanc,* J. See also Ellis *v.* Warnes, Cro. Jac. 33, Yelv. 47. And such is the settled law in New York. Dix *v.* Van Wyck, 2 Hill, 522; Holmes *v.* Williams, 10 Paige, 326; Powell *v.* Waters, 8 Cowen, 669; Kent *v.* Walton, 7 Wend. 256. See also Flemming *v.* Mulligan, 2 McCord, 173; Houghton *v.* Payne, 26 Conn. 396; Brown *v.* Waters, 2 Md. Ch. 201.

(*p*) But even under this act it is held, that if there has been any usury, either between the original parties to the note, or in any subsequent transfer thereof, the holder, to bring himself within the provisions of the act, must show affirmatively that he is a *bona fide* holder, and he must also have received the note without any notice of such usury. Wyat *v.* Campbell, Moody & M. 80; Meagoe *v.* Simmons, id. 121.

(*q*) See statutes of Maine, Michigan, and Arkansas, cited above, pp. 401, 403. Under a similar provision which formerly existed in New York, it was held that when usurious bills and notes were transferred after they became due, the holder received them subject

The renewal of a usurious contract between the original parties, or others cognizant of the usurious transaction, is in like manner usurious.(*r*) If a usurious note is given up, and a new note be taken for the principal and legal interest, omitting all excess, the new note is good.(*s*) But it has been held that when the consideration was in part usurious and in part legal, a note could not be enforced, even for that part which was good, although that part exceeded the amount of the note.(*t*)

If such a note or bill be given, and several notes or bills be substituted for it, the effect of the illegality may be confined to a part, leaving the others exempt; and if, while all are due, there is a promise to pay a part but not the rest, it will be held that this promise makes the notes to which it relates applicable to the legal consideration, and therefore valid.

If all the usurious interest payable on a contract has been paid, a new note for the balance, consisting only of the principal and legal interest, is said to be valid.(*u*) The law applies pay-

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to the defence of usury existing against them as between the immediate parties to the instrument. Hackley *v.* Sprague, 10 Wend. 113. So in Maine, Wing *v.* Dunn, 24 Maine, 128. An indorsee of a note given for extra interest cannot claim the character of an innocent purchaser whose agent was cognizant of the circumstances of its origin. Goodrich *v.* Buzzell, 40 Maine, 500.

(*r*) Marsh *v.* Martindale, 3 Bos. & P. 154; Preston *v.* Jackson, 2 Stark. 237; Pickering *v.* Banks, Forrest, 72; Chapman *v.* Black, 2 B. & Ald. 588; Gray *v.* Brown, 22 Ala. 262; Brown *v.* Waters, 2 Md. Ch. 201; Coulter *v.* Robertson, 14 Smedes & M. 18; Torrey *v.* Grant, 10 id. 89; Flemming *v.* Mulligan, 2 McGord, 173; Quarles *v.* Brannon, 5 Strob. 151; Bridge *v.* Hubbard, 15 Mass. 96; Walker *v.* Bank of Washington, 3 How. 62; Powell *v.* Waters, 8 Cowen, 685; Reed *v.* Smith, 9 id. 647; Warren *v.* Crabtree, 1 Greenl. 167; Lowell *v.* Johnson, 14 Maine, 240; Hazard *v.* Smith, 21 Vt. 123; Jackson *v.* Jones, 13 Ala. 121; Simpson *v.* Fullenwider, 12 Ired. 334; Bubier *v.* Pulsifer, 4 Gray, 592. And so if a usurious debt due by a firm be divided on its dissolution, and each partner assume a part, the division of the debt does not purge it of the usury. Holland *v.* Chambers, 22 Ga. 193.

(*s*) Barnes *v.* Hedley, 2 Taunt. 184, 1 Camp. 157 – 180; Marchant *v.* Dodgin, 2 Moore & S. 632; Preston *v.* Jackson, 2 Stark. 237; Wicks *v.* Gogerley, Ryan & M. 123; Kilbourn *v.* Bradley, 3 Day, 356; Scott *v.* Lewis, 2 Conn. 132; Church *v.* Tomlinson, 2 Conn. 134, note; Bank of Monroe *v.* Strong, 1 Clarke, Ch. 76; Wright *v.* Wheeler, 1 Camp. 165, note; Chadbourn *v.* Watts, 10 Mass. 121; Cummins *v.* Wire, 2 Halst. Ch. 73; Fowler *v.* Garret, 3 J. J. Marsh. 681; McClure *v.* Williams, 7 Vt. 210; De Wolf *v.* Johnson, 10 Wheat. 367; Hammond *v.* Hopping, 13 Wend. 505; Miller *v.* Hull, 4 Denio, 104.

(*t*) Harrison *v.* Hannel, 5 Taunt. 780, 1 Marsh. 349.

(*u*) But it is held that general payments made on a usurious contract will be imputed to the principal sum, and not to the usurious interest; and that if these payments equal the principal sum loaned, a note given for the excess of the principal and

ments made on a usurious contract to the lawful rather than to the illegal demand.(*v*) But not if the payments are made upon different contracts.(*w*)

The ordinary way of discounting notes and bills, by taking the interest in advance out of the sum paid, is undoubtedly usurious, in the strict sense of the word. For the lender receives interest on the whole for the use of but a part; thus if A, in Massachusetts, where legal interest is six per cent, discounts for B a note of one hundred dollars, payable in one year, A gives B ninety-four dollars, and has six dollars, which is all the interest the law allows for one hundred dollars, given him for the use of ninety-four dollars for one year. But the custom is too firmly and universally established, both in England and in this country, to be shaken.(*x*)

It is obvious, however, that there must be some limits to it, as the usury is the greater in proportion as the period for which discount is taken is longer. Thus if A, as above, discounts a note for B, payable in sixteen years and two thirds, he would deduct from one hundred dollars just one hundred, and the borrower

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usurious interest over the amount paid, is a note for usurious interest, and is illegal and void. Stanley *v.* Westrop, 16 Texas, 200.

(*v*) Saunders *v.* Lambert, 7 Gray, 484; Wright *v.* Laing, 3 B. & C. 165.

(*w*) Primrose *v.* Anderson, 24 Penn. State, 215.

(*x*) Doe *v.* King, 11 M. & W. 333; Thornton *v.* Bank of Washington, 3 Pet. 36; Agricultural Bank *v.* Bissell, 12 Pick. 586; Lyman *v.* Morse, 1 id. 295, note; Utica Ins. Co *v.* Bloodgood, 4 Wend. 652; Bank of Utica *v.* Phillips, 3 id. 408; Manhattan Co. *v.* Osgood, 15 Johns. 162; Marvine *v.* Hymers, 2 Kern. 223, in which case *Denio*, J. commented upon all the cases that have arisen upon this point in New York, and declared that the rule had been established and acted upon in that State for nearly forty years, and could only be changed by legislation. Renner *v.* Bank of Columbia, 9 Wheat. 581; Ticonic Bank *v.* Johnson, 31 Maine, 414; Quinsigamond Bank *v.* Hobbs, 11 Gray, ; Sessions *v.* Richmond, 1 R. I. 298. In Illinois, discounting is declared by statute not to be usury. Stats. Comp. 1858, Vol. I. p. 601. In Bank of Utica *v.* Wager, 2 Cowen, 712, 769, *Savage*, C. J. expressed the opinion that this privilege of discounting is confined to bankers, and those who deal in commercial paper by way of trade, asserting this to be the rule in England. But New York Firemen Ins. Co. *v.* Ely, 2 Cowen, 678, and New York Firemen Ins. Co. *v.* Sturges, id. 664, hold that there is no such distinction between these and other companies and persons. And it is so held also in Parker *v.* Cousins, 2 Gratt. 372; McGill *v.* Ware, 4 Scam. 21; Cole *v.* Lockhart, 2 Cart. Ind. 631; Maine Bank *v.* Butts, 9 Mass. 54, in which case it was decided that the privilege of discounting was not confined to banks. But individuals have a like authority, although in both cases the construction is a relaxation of the prohibitions of the statute against usury, and allows a rate of interest which may be estimated at a small extent beyond six per cent per annum.

would not receive a dollar, but would give his note for the whole amount, without receiving any part of it. Still, we are not aware of any rule on this subject, or of any definite limits which are fixed by adjudication or by usage: but the courts declare their intention to confine this deduction of interest to the discount of notes and bills, and of such as have not an unusually long period of payment.(*y*)

Somewhat similar remarks may be made as to taking interest for both the day of the date and the day when due.(*z*) So, also, as to the use of Rowlett's tables, which consider three hundred and sixty days a year, but nevertheless qualify this error somewhat by casting all fractions on the right side.(*a*) The true reason of what we think the better rule on this subject — for there is some conflict in the decisions — is, that the rule *de minimis non curat lex*, especially when the slight error is made merely for convenience, and not with usurious design, applies to the transaction, and prevents it from being usurious.(*b*)

A peculiar question is sometimes presented when the law of usury becomes complicated with the law of partnership. If one advances money to a firm, on which he is to receive a share of the profits, and to be answerable to the creditors of the firm for its debts, this certainly is not usury, because the advancer becomes a partner, and has the liabilities of one.(*c*) Nor is it made usury if the firm agree to pay him interest at all events, and to bear all losses and hold him harmless; for partners may make what agreement with each other they choose to make; and he still takes the risk of his liability to the creditors.(*d*) On the

(*y*) In Marsh *v.* Martindale, 3 Bos. & P. 154, the plaintiff had discounted a bill of exchange, payable in three years, and deducted the interest for that period; and this was held to be usurious on the authority of Barnes *v.* Worlich, Cro. Jac. 25, Yelv. 31; Lord *Alvanley*, C. J. said: "If, therefore, nothing more has been done in this case than what always has been done by way of accommodation among merchants, the transaction was not usurious; but the rule must be confined strictly to that sort of transaction; for if discount be taken upon an advance of money without the negotiation of a bill of exchange, it will amount to usury, as appears clearly from the cases which were cited in the argument. We must, therefore, consider what was the real transaction between the parties."

(*z*) Crump *v.* Nicholas, 5 Leigh, 251; State Bank *v.* Cowan, 8 id. 238.

(*a*) See *supra*, p. 411, note *s*.

(*b*) Parker *v.* Cousins, 2 Gratt. 372; Planters' Bank *v.* Snodgrass, 4 How. Miss. 573.

(*c*) Morisset *v.* King, 2 Burr. 891; Gilpin *v.* Enderby, 5 B. & Ald. 954, 1 Dow. & R. 570; Fereday *v.* Hordern, Jacob, 144.

(*d*) See the cases cited in previous note.

other hand, if he lends money to the firm, to have his legal interest and some share of the profits besides, and the intent and form of the loan are such that he cannot be made responsible to the creditors of the firm, this is certainly usurious.(*e*)

The question whether a transaction belongs to one or the other of these classes, will often, or indeed generally, be one of fact, or of construction. And it may happen — as is indicated by some of the authorities — that this question will be decided in one way or the other, accordingly as it is presented. If the advancer or lender sues his note, usury may be alleged in defence; and yet, if one who has given the same or a similar note be sued by the creditors of the partnership, it may be that he will be held liable to them, on the ground that he participated in the profits, and cannot defend himself by alleging his own usury.(*f*)

SECTION II.

OF COMPOUND INTEREST.

Compound interest is often spoken of in the books as if it were open to the objection of usury. This we think is a mistake. At farthest, it may be said, as in a recent case, to savor of usury.(*g*) It is neither a loan on excessive interest, nor a bargain to forbear; for the new interest is for the use of the old interest, and not for the use of the principal; and the borrower can always pay the principal and interest, and thus put a stop to compounding. And in this respect it is rather like an agree-

(*e*) Morse *v.* Wilson, 4 T. R. 353; Huston *v.* Moorhead, 7 Barr, 45.

(*f*) Compare Morse *v.* Wilson, 4 T. R. 353, and Gilpin *v.* Enderby, 5 B. & Ald. 954, 5 J. B. Moore, 571, with Grace *v.* Smith, 2 W. Bl. 998. See also case of Lane, cited in 17 Ves. 405.

(*g*) "The result of the doctrines upon this subject seems to be, that a contract to pay compound interest is not usurious or void; that an agreement to pay interest annually or semi-annually is valid, and may be enforced by action; that a claim for interest on such interest is an equitable claim, but that on an action brought, interest will not be allowed on interest from the time it fell due, because it would savor of usury, and because the holder of the note, by forbearing to call for his interest when it became due, shall be deemed to have waived his right to have the interest converted into capital." Per *Shaw*, C. J., in Wilcox *v.* Howland, 23 Pick. 167. See also Ossulston *v.* Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99; Mowry *v.* Bishop, 5 Paige, 98; Childers *v.* Deane, 4 Rand. 406.

ment to pay money with a penalty for the non-payment, which we have seen is not held to be usurious.

The true objection to it is grounded upon public policy, because it may be so easily made to entrap and oppress the unwary. Still, in the present state of the authorities, it can hardly be supposed that a bargain for compound interest would be enforced,(*h*) although there is not, so far as we know, any direct authority for saying that such a contract, if in itself entirely free from fraud and oppression, must be declared to be void.(*i*)

Upon the renewal of a note already due, it is not usurious to give a new note bearing interest for the sum of the former note and interest due thereon at the time, computed either at simple interest,(*j*) or upon the principles of compound interest; (*k*) and a note given upon the settlement of an account in which compound interest is charged, is not usurious.(*l*) And a note given for the difference between simple and compound interest on prior notes has been held valid.(*m*)

Upon a note with interest payable annually, an action lies for the interest, as it falls due before the principal is payable.(*n*) But when a note is payable in instalments, with interest, the interest is payable on the several instalments as they fall due,

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(*h*) Hastings *v.* Wiswall, 8 Mass. 455; Doe *v.* Warren, 7 Greenl. 48; Sparks *v.* Garrigues, 1 Binney, 165; Catlin *v.* Lyman, 16 Vt. 44; Rodes *v.* Blythe, 2 B. Mon. 335; Ossulston *v.* Yarmouth, 2 Salk. 449; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Ferry *v.* Ferry, 2 Cush. 92. A indorsed several notes to B, which were payable in two, three, and more years from date, with interest, and gave B a written promise to pay him annual interest on the notes, if the makers should not pay it. After all the notes were paid, B brought an action against A to recover the difference between the amount of annual interest and the interest which had been paid. Held, that it could not be maintained. Henry *v.* Flagg, 13 Met. 64.

(*i*) Indeed, the cases may be regarded as holding that such an agreement is *not* usurious. Hamilton *v.* Le Grange, 2 H. Bl. 144; Camp *v.* Bates, 11 Conn. 487; Sheldon *v.* Steere, 5 id. 181; Wilcox *v.* Howland, 23 Pick. 167; Hill *v.* Meeker, 23 Conn. 592.

(*j*) Magruder *v.* State Bank, 18 Ark. 9; Turner *v.* Miller, 1 Eng. Ark. 463; Holland *v.* Mosteller, 6 Jones, N. C. 582.

(*k*) Otis *v.* Lindsey, 10 Maine, 315; Camp *v.* Bates, 11 Conn. 487, in which case this point is discussed at length.

(*l*) Kellogg *v.* Hickok, 1 Wend. 621.

(*m*) Wilcox *v.* Howland, 23 Pick. 167.

(*n*) Greenleaf *v.* Kellogg, 2 Mass. 568; Cooley *v.* Rose, 3 id. 221; Herries *v.* Jamieson, 5 T. R. 553; Catlin *v.* Marsh, 16 Vt. 44; Walker *v.* Kimball, 22 Ill. 537

and not annually on the whole principal sum remaining unpaid.(*o*) If interest is payable annually or semiannually, and it is not paid, nor demanded, nor sued for, at the time it becomes due, interest on such interest cannot generally be collected subsequently.(*p*) And when partial payments have been made upon notes or other securities for money, every payment is first applied to keep down the interest. In a case in Massachusetts, the Supreme Court lay down a rule for the settlement of an account on which payments have been made; and this rule has been quite generally approved.(*q*)

Courts sanction the settlement of accounts with annual rests, although this leads to compounding of interest,(*r*) and sometimes direct such accounts, especially when a trustee has used

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(*o*) Bander *v.* Bander, 7 Barb. 560; Austin *v.* Imus, 23 Vt. 286.

(*p*) Hastings *v.* Wiswall, 8 Mass. 455; Dean *v.* Williams, 17 id. 417; Ferry *v.* Ferry, 2 Cush. 92; Von Hemert *v.* Porter, 11 Met. 210; Doe *v.* Warren, 7 Greenl. 48; Connecticut *v.* Johnson, 1 Johns. Ch. 13; Van Benschooten *v.* Lawson, 6 id. 313; and see Howe *v.* Bradley, 19 Maine, 31. *Contra*, see Singleton *v.* Lewis, 2 Hill, S. C. 408; Gibbs *v.* Chisolm, 2 Nott & McC. 38; Peirce *v.* Rowe, 1 N. H. 179; Pawling *v.* Pawling, 4 Yeates, 220. In California and Oregon it is provided by statute that the parties may, in any contract in writing, whereby any debt is secured to be paid, agree that if the interest on such debt be not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt. Wood's Dig. 1858, p. 551; Stats. of Oregon, 1855, p. 532. In Vermont, it is held that upon a note for the payment of money with interest annually, interest is to be cast upon that interest from the time it becomes due until the note is actually paid. Austin *v.* Imus, 23 Vt. 286. See also Kennon *v.* Dickens, 1 Taylor, 231; Talliaferro *v.* King, 9 Dana, 331.

(*q*) The rule is thus stated: "Compute the interest on the principal sum from the time when the interest commenced to the first time when a payment was made, which exceeds, either alone or in conjunction with the preceding payments, if any, the interest at that time due; add that interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, if any, and the remainder forms a new principal, on which compute and subtract the interest, as upon the first principal; and proceed in this manner to the time of the judgment." Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 194; Wilcox *v.* Howland, 23 id. 167; Van Vronker *v.* Eastman, 7 Met. 157; Reed *v.* Reed, 10 Pick. 398. The rule above was expressly adopted in Leonard *v.* Wildes, 36 Maine, 265. And so Russell *v.* Lucas, 1 Hempst. C. C. 91; Smith *v.* Shaw, 2 Wash. C. C. 167; Treat *v.* Stanton, 14 Conn. 445; Commonwealth *v.* Miller, 8 S. & R. 452; Ross *v.* Russell, 11 Foster, 386; Wasson *v.* Gould, 3 Blackf. 18; McFadden *v.* Fortier, 20 Ill. 509. Riney *v.* Hill, 14 Misso. 500; Williams *v.* Houghtaling, 3 Cowen, 86; Stark *v.* Hunton, 2 Green, Ch. 300; Meredith *v.* Banks, 1 Halst. N. J. 408. And so provided by statute in Kentucky, R. S 1852, ch. 53, § 5; Alabama, Code, 52, § 1522; Mississippi, Code, 1857, ch. 50, p. 370.

(*r*) Eaton *v.* Bell, 5 B. & Ald. 34; Ex parte Bevan, 9 Ves. 223; Stoughton *v.* Lynch, 2 Johns. Ch. 209, 214; Barclay *v.* Kennedy, 3 Wash. C. C. 350; Backus *v.* Minor, 3 Calif. 231; Eslava *v.* Lepretre, 21 Ala. 504.

the funds of his *cestui que trust*,(*s*) and in some instances expressly direct the interest to be compounded. But merchants' accounts cannot be settled in this way after mutual dealings have ceased.(*t*)

It may be proper to add a general remark, which has been already intimated, but may be repeated, as it applies to all the questions we have considered in reference to usury, and to all others which can arise. It is this: that, if a transaction be in fact and substance and intention a loan on usurious interest, and this can be proved, it will not be protected because it has assumed any one of the forms we have been considering, or any other form.

SECTION III.

OF THE SALE OF NOTES AND BILLS.

The questions which arise from the actual or pretended sale of promissory paper, or the sale of credit by the indorsement of such paper, are closely connected with the law of usury. That negotiable paper may be sold for whatever it is worth, or for whatever the seller and the buyer may agree upon, it would seem to be absurd to deny. And yet we incline to think that a thorough and consistent admission of this principle would have prevented a part, at least, of the confusion and conflict of authorities upon this subject.

If A, as indorsee or as payee of the note of B, which he holds for value, sells this note for less than its face to C, without indorsing it himself, this is admitted to be not usurious.(*u*) But if C proposes to lend money to B, and to avoid usury has the note made to A, who has no interest in it himself, and then pays the money to A, who pays it to B, this is no more than a circuitous loan to B, and is usurious. Hence, we may draw one rule; if no party to the note who is prior to the holder could himself bring an action upon it against the maker, then no prior

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(*s*) Boynton *v.* Dyer, 18 Pick. 1; Robbins *v.* Hayward, 1 Pick. 528, note.

(*t*) Denniston *v.* Imbrie, 3 Wash. C. C. 396, 402; Von Hemert *v.* Porter, 11 Met. 210.

(*u*) Durant *v.* Banta, 3 Dutcher, 624; Freeman *v.* Brittin, 2 Harrison, 191; Saltmarsh *v.* Planters, &c. Bank, 17 Ala 761; per *Parsons*, C. J., in Churchill *v.* Suter 4 Mass. 156, 162; Williams *v.* Reynolds, 10 Md. 57.

party ever owned the note, and the holder, being the first owner, must be held to have loaned the money to the maker, through the prior parties, who were only agents of the maker; and on the other hand, if either prior party could have maintained an action, he owned the note and sold it to the holder.(*v*)

On this ground it has been held, that as accommodation paper, made for the purpose of raising money, is not available security as between the original parties, the purchase of it amounts to a loan merely; and if the sum paid for it gives more than legal interest to the purchaser, the transaction is usurious, and no recovery can be had against the parties to it.(*w*) And collateral paper, made by the same parties to secure such paper, is equally void.(*x*)

(*v*) This rule was held to be the test of an unobjectionable note in Powell *v.* Waters, 8 Cowen, 669, 686, per *Jones*, Chancellor; Munn *v.* Commission Co., 15 Johns. 44; Powell *v.* Waters, 17 id. 176; Williams *v.* Reynolds, 10 Md. 57; Voight *v.* Rambo, 1 Phila. 146.

(*w*) Bossange *v.* Ross, 29 Barb. 576; Clark *v.* Sisson, 4 Duer, 408; Catlin *v.* Gunter, 1 Kern. 368; Corcoran *v.* Powers, 6 Ohio State, 19; Blodgett *v.* Wadhams, Hill & Denio, 65; Clark *v.* Loomis, 5 Duer, 468, in which case *Bosworth*, J. said: "We consider this rule to have been uniformly acted upon, judicially, for too long a period, to leave us at liberty to treat it as an open question." Williams *v.* Storm, 2 Duer, 52; Flemming *v.* Mulligan, 2 McCord, 173; Veazie Bank *v.* Paulk, 40 Maine, 109; Bock *v.* Lauman, 24 Penn. State, 435; Dunscomb *v.* Bunker, 2 Met. 8; Van Schaack *v.* Stafford, 12 Pick. 565; Carlisle *v.* Hill, 16 Ala. 398; Saltmarsh *v.* Planters, &c. Bank, 14 id. 668; Simpson *v.* Fullenwider, 12 Ired. 334; Richardson *v.* Scobee, 10 B. Mon 12; Newman *v.* Williams, 29 Missis. 212.

(*x*) Clark *v.* Loomis, 5 Duer, 468; Corcoran *v.* Powers, 6 Ohio State, 19. But where the maker of a promissory note annexes thereto a certificate that the same is given for value, and will be paid when due, or that it is business paper, and the note is afterwards sold to a third person, for an amount less than should have been paid for it if discounted at legal interest, the maker is estopped from setting up the defence of usury. Chamberlain *v.* Townsend, 26 Barb. 611; Mechanics' Bank, &c. *v.* Townsend, 29 id. 569; Truscott *v.* Davis, 4 id. 495; Clark *v.* Sisson, 4 Duer, 408. "The case of certificates or representations is an exceptional one, and of comparatively recent origin. And even this exception, the adoption of which admits the general rule to be otherwise, although sanctioned by several decisions, has never yet been finally established in the court of last resort" in New York. Per *Roosevelt*, J., in Bossange *v.* Ross, 29 Barb. 576. But where the payee of such a note makes such a representation upon his indorsement of it, the maker may set up the defence of usury, although the payee could not. Dowe *v.* Schutt, 2 Denio, 621. But the fact that an accommodation bill contains the words "value received" does not estop any party to it from showing that it was usurious at its inception. Clark *v.* Loomis, 5 Duer, 468. In Pennsylvania, however, it was held otherwise, in Gaul *v* Willis, 26 Penn. State, 259; but *Lewis*, C. J. remarked that if the statute of the State made usurious notes absolutely void, there might be an insuperable obstacle to a recovery on them, however fairly acquired.

It seems also to be settled, that, if a maker of a note or an acceptor of a bill discount it himself for more than the interest, this is not usury, because he only pays a debt before it is due, and may make his own terms.(*y*) If, however, an indorsee of a note, who sells it, indorses it himself, he not only transfers the note, but makes himself liable for the face of it; and if he sells it for less than the face, there are four views which may be taken of this transaction. One is, that it is simply a usurious transaction; (*z*) the second, that it is not usurious, because the indorsement shall be held to be for the purpose of transfer only, and shall have the same effect as if the phrase "without recourse" were added, or, in other words, the indorser is not made liable in any event; (*a*) a third is, that it is not usurious because, although the purchaser may recover against the maker or other prior parties the whole amount, as against the indorser and seller he shall recover what he paid, with legal interest; (*b*)

(*y*) Barclay *v.* Walmsley, 4 East, 55, per Lord *Ellenborough:* It is "improper practice, but not usury." Fulwiler *v.* Jackson, 1 Phila. 145.

(*z*) Freeman *v.* Brittin, 2 Harrison, 191; since overruled, however, in Durant *v.* Banta, 3 Dutcher, 624. See *infra*, note *b*. It is the established rule in North Carolina, that "the discounting of a bill or bond, and taking the general indorsement of the holder, does, *ex vi termini*, constitute a loan, and if the rate of discount exceed that fixed by the statute, it is an usurious loan" Collier *v.* Nevill, 3 Dev. 30; McElwell *v.* Collins, 4 Dev. & B. 210; Ballinger *v.* Edwards, 4 Ired. Eq. 449; Ray *v.* McMillan, 2 Jones, N. C. 227; and in Bynum *v.* Rogers, 4 id. 399, it is said that "these cases establish a clear rule by which to distinguish between a sale of a bill or note and a loan, — to wit, when the instrument is transferred by the indorsement of the person receiving the money, it is a loan, because the indorser is liable for the debt; but when the transfer is simply by delivery, it is a sale, if the transaction is *bona fide*." In these cases the question of intent seems to have been treated as a question of law for the determination of the court, and not a question of fact for the jury. That such discounting of a valid bill or note is a sale, and not a loan, see cases cited *infra*, note *h;* and also State Bank *v.* Coquillard, 6 Ind. 232; Gaul *v.* Willis, 26 Penn. State, 259; Saltmarsh *v.* Planters, &c. Bank, 17 Ala 761; Newman *v.* Williams, 29 Missis. 212; Young *v.* Miller, 7 B. Mon. 540.

(*a*) Cowles *v.* McVickar, 3 Wisc. 725.

(*b*) This is the doctrine held in New York. Cram *v.* Hendricks, 7 Wend. 569, where the question is discussed at length; Rapelye *v.* Anderson, 4 Hill, 472; Braman *v.* Hess, 13 Johns. 52; Munn *v.* Commission Co., 15 id. 44; Ingalls *v.* Lee, 9 Barb. 647; Cobb *v.* Titus, 13 id. 45. So in Maine. French *v.* Grindle, 15 Maine, 163; Farmer *v.* Sewall, 16 id. 456; Lane *v.* Steward, 20 id. 98. And see also Dunkle *v.* Renick, 6 Ohio State, 527, 535; Brock *v.* Thompson, 1 Bailey, 322; May *v.* Campbell, 7 Humph. 450; Stevenson *v.* Unkefer, 14 Ill. 103; Metcalf *v.* Pilcher, 6 B. Mon. 529; Hutchins *v.* M'Cann, 7 Port. Ala. 94; Noble *v.* Walker, 32 Ala 456. Whether the indorsee in such case may recover the whole amount of the note, or only according

the fourth is, that the transaction is in itself not open to the charge of usury, and the purchaser shall recover the whole amount for which it is payable from all the parties to it.(*c*)

Our own opinion is decidedly in favor of this last view, although we admit that authorities of much weight lead to a different conclusion. We apprehend, however, that when the rules and usages of merchants in relation to negotiable paper, which are themselves based upon its true nature and purpose and function, are more completely established, as a part of the law merchant, such will be the view taken of this question by the courts.

Our reasons are these. In point of fact, there is seldom an intent of usury, for the indorser of a note, in a vast majority of cases does not expect to be obliged to take it up; the usage is not that the makers and acceptors of notes and bills become insolvent and throw the burden on the indorsers; but when this happens it is an exception; for the rule is the other way; and the expectation and presumption of the law should conform to the actual probability. In the next place, a holder has, it is admitted, the right to sell his note for whatever he can get; and he certainly ought to have the right to enhance its value and lessen his sacrifice by adding to it his guaranty. In the third place, usury is in its nature penal, and should be construed strictly, not liberally,(*d*) and in such a transaction there is neither a loan nor any forbearance of money. We cannot see that this should be regarded as usury, any more than if one sells a horse, and says to the buyer as an inducement to him to give a high price, "I know his qualities better than you do, and I will warrant you that he will next spring sell for two hundred dollars, and if he does not I will make up your loss." And finally,

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to the consideration paid, was a question which the Supreme Court of the United States expressly waived in the case of Nichols *v.* Fearson, 7 Pet. 103. No matter in what way the party may bind himself at the time of the transfer of the instrument, whether by guaranteeing the payment thereof by simple contract or by bond, or by signing as "security," in the hands of the assignee, the liability is limited to the amount actually paid, as in the case of an indorsement. Cobb *v.* Titus, 13 Barb. 45; Mazuzan *v.* Mead, 21 Wend. 285; Rapelye *v.* Anderson, *supra*. But in an action against a third person, who indorsed the note as the surety of the maker, the rule of damages is the same as against the maker. Belden *v.* Lamb, 17 Conn. 441.

(*c*) This is the view adopted in a very recent decision in New Jersey, overruling former decisions in that State. Durant *v.* Banta, 3 Dutcher, 624, 632, 635. Perhaps the known insolvency of the maker would be evidence of usurious intent in such case.

(*d*) Per *Potts*, J., in Durant *v.* Banta, 3 Dutcher, 624, 626.

we believe the proper and reasonable utility of negotiable paper will be found to be greatly abridged, if it be the law that the holder cannot sell it under his own suretyship and guaranty, without tainting it with usury.

There is, however, another question attending these sales. It is admitted, that if one knowingly buys a note of the maker, or a bond, through the agent of the maker, for less than its face, this is a loan to him, and a usurious one. If, for example, a railroad company makes its bonds, payable at a distant period, with interest coupons attached, and sells them, by its officers, or a broker, or other agent, for less than their face, this must be usury. But does it affect as usury one who purchases them in ignorance of the circumstances? The question we would ask, is this: If one purchases such bonds for less than their face, not from the railroad, but from one whom he verily believes to own them, for value, or if one purchases them without any knowledge or opinion on the subject, but in fact from one not the railroad, can the defence of usury be made against those bonds in his hands, on the ground that the railroad was actually the seller, and the purchaser the first holder? It may not be certain how the courts would answer this question; but we think the authorities favor the conclusions to which we should be led by what seem to us the reasons of the case. They are, that one who purchased for value, in good faith, and in the belief that he did not buy from the railroad, but from some subsequent holder, certainly was not open to the defence of usury. And we go farther, although with less confidence, and say, that the usurious intent must be proved by the party who would profit by it, and therefore, if the maker of such bonds or notes would defend against them, in whole or in part, on the ground that they constituted a usurious contract between the plaintiff and himself, he must bring home to the plaintiff the knowledge that the plaintiff bought them of the defendant, in fact though indirectly, or, at the very farthest, such means of knowledge or reasons for belief as would make his ignorance his own fault.(*e*)

What we have already said may dispose substantially of a question which has run through many cases. It is, if a note be

(*e*) It is provided by statute in Pennsylvania, that canal and railroad companies may sell their bonds under par. Purdon's Dig. 1856, p. 1182, § 1.

valid at its inception, and through some usurious transaction comes into the hands of an innocent holder for value, can he go behind this illegitimate transfer, to the prior parties? (*f*) There has been a tendency to make this distinction. If the previous indorsements were blank, he might fill any earlier one to himself, and thus look to any prior party by giving up those subsequent. But if the indorsements were in full, so that he must make title through this illegitimate transfer, he cannot go beyond it. We do not see sufficient reason for these views. Even if what we have already said, that an intermediate transfer by indorsement, for less than the face, if a *bona fide* sale, is not usurious, be not admitted, still we hold it to be unreasonable to say that any persons are affected by the usury beyond those who are guilty of it; for the terms of the law do not require it, and certainly justice does not demand it. And on general grounds, it would be difficult to say, that any transferee of a note, for an illegal consideration might not himself sue a party who was prior to his transferrer, on the ground that he holds his transferrer's title.

(*f*) See Daniel *v.* Cartony, 1 Esp. 274; Parr *v.* Eliason, 1 East, 92; King *v.* Johnson, 3 McCord, 365; Freeman *v.* Brittin, 2 Harrison, 191; Harick *v.* Jones, 4 McCord, 402; Foltz *v.* Mey, 1 Bay, 486; Bush *v.* Livingston, 2 Caines, Cas. 66; Campbell *v.* Read, Martin & Y. 392; Knights *v.* Putnam, 3 Pick. 184. The above cases hold that such *bona fide* holder may recover against the prior parties. See the case of Lloyd *v.* Keach, 2 Conn. 175, which seems to be in conflict with most of the authorities. In Lowes *v.* Mazzaredo, 1 Stark. 385, it was decided that usury on the part of the payee of a note was a bar to an action by a *bona fide* holder, because he could not bring himself in connection with the maker, except through the medium of usurious indorsement; and this case was approved in Chapman *v.* Black, 2 B. & Ald. 588. See also, in this connection, note *n*, *supra*; Newman *v.* Williams, 29 Missis. 212; Adams *v.* Rowan, 8 Smedes & M. 624. Some authorities hold that such note cannot be enforced by the usurious indorser himself. Nichols *v.* Fearson, 7 Pet. 107; Freeman *v.* Brittin, 2 Harrison, 191. In Gaither *v.* Farmers & Mechanics' Bank, 1 Pet. 37, it is said, that although the rule cannot be doubted, that, if a note be free from usury in its origin, no subsequent usurious transactions respecting it can affect it with the taint of usury, yet the maker may defend against an indorser of the note whose property in it was acquired through a usurious transaction. "Suppose a note," says *Johnson*, J., "given to a woman, who marries, and then indorses it without her husband's authority; such indorsement would be void; and the indorsee could not recover, yet the husband and wife may recover."

SECTION IV.

OF THE SALE OF CREDIT.

Questions have arisen under the law of usury when an indorser sells his credit. A, for example, makes a note to B, and B wishes to get it discounted, and for this purpose requires a stronger name than his own, or at all events an additional name, and he applies to C, who agrees to indorse it for a certain commission, or a certain sum outright. Or perhaps cross notes are given, both B and C wishing the other's name, but as C's name is much the strongest, and he runs a greater risk by indorsing for B than B incurs by indorsing for him, it is agreed that B shall pay C, beside his note, or in his note, a commission, or a *bonus*, for the benefit derived from this use of his name.

There are cases which would lead to the conclusion that this transaction is usurious; (*g*) but, as before, we think them erroneous, and hold, with the support of what we think the better authorities, that it is but a sale of credit, and that a man who is possessed of credit, whether it be founded upon his character, or

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(*g*) The courts have sometimes said, that giving of one's own promise to pay to another, for any consideration, cannot be brought within the definitions of a sale; but that *prima facie*, at least, such a transaction is a loan. "But the opinion of Judge *Gardiner*, in Dry Dock Bank *v.* Am. Life Ins. & Trust Co., 3 Comst. 344, shows conclusively, — 1. That credit cannot be loaned; and 2. That the statute of usury applies only to loans of money or its equivalent." Per *Selden*, J., in Schermerhorn *v.* Talman, 14 N. Y. 93, 117. In this case it was held that an exchange of negotiable obligations, for the purpose of enabling one of the parties to raise a sum of money, was a loan, and that the amount ultimately to be paid by the borrower being greater than that to be paid by the lender, the transaction was usurious, although the difference was produced by the insertion of different rates of interest, into two securities. *Denio*, C. J. also gave an opinion, and, although concurring with Mr. Justice Selden, in the result of the case and the general points upon which it was decided, he maintained, contrary to the reasoning of Selden, that there is a principle upon which such a loan would be free from usury. "If the paper advanced by the lender instead of money has a fixed market value, it may, I think, be safely loaned at such value, though the money secured by it may be mathematically less than that which the lender agrees to pay. Such is the case with public stocks." "But," adds the learned judge, "in the absence of any such artificial or market value, and where the transaction is really a loan, and the borrower has bound himself to pay more money than the securities which he has received from the lender will oblige the latter to pay, the difference is an usurious premium."

his property, or both, has as good a right to sell it as he has to sell any other of his possessions, and for the most he can get.(*h*)

Besides the ordinary discount of interest, of which we have spoken, there is still another way in which banks and brokers and money-lenders receive more, and sometimes much more, than legal interest; and it is by what is, or at least is called, exchange. If, for example, a Boston bank discount a note payable in Boston, it can reserve but six per cent; but if it discount a draft or bill drawn on New York, or a note made payable there, it may charge in addition to this discount, another for the rate of exchange which shall suffice to bring back the money to Boston, or, in other words, to make it money in Boston.(*i*)

(*h*) In Dry Dock Bank *v.* American Life Ins. & Trust Co., 3 Comst. 344, *Gardiner*, J. said: "The credit of one person may be rendered available to another by gift, or sale, and in no other way. This may be done by a direct contract between the parties, as an exchange of notes, which is the sale of one promise for another; by an undertaking with third persons directly; or one to be used for the benefit and according to the discretion of the donee or vendee. When the responsibility is incurred gratuitously, it is in popular language called a loan; and when for a consideration, a sale of credit. In this sense a sale of credit is no more within the prohibition against usury than a sale of merchandise. Accordingly, in Trotter *v.* Curtis, 19 Johns. 160, and in Suydam *v.* Westfall, 4 Hill, 211, it was held that a commission of $2\frac{1}{2}$ per cent for accepting, in addition to interest on the money advanced, was not usurious. So where a bond and mortgage were sold for $2,600, and the bond of the vendor given to the vendee, conditioned that the mortgagor should pay $3,000, the amount of the mortgage. Rapelye *v.* Anderson, 4 Hill, 472. So the sale of an indorsement at three per cent, on the amount of a note intended to be, and which was, discounted at the legal rate, was held valid. Ketchum *v.* Barber, 4 Hill, 223. And in More *v.* Howland, 4 Denio, 264, it was decided that a guaranty was the subject of sale, and the price paid for it, immaterial. The principle of these cases applies to every engagement, direct or collateral, assumed in good faith, by one man for another for a stipulated consideration. The exchange of notes for a premium greater than the legal rate of interest is no exception to the general rule. This was, in effect, determined in Dunham *v.* Day, 13 Johns. 40. . . . It is sometimes asked, Why should a man be permitted to receive ten per cent on an exchange of notes, when if he advanced money on the same security he would get but seven? The answer is, for the same reason, that he is permitted to receive $20 for six months' use of furniture valued at $100. The one is prohibited, the other not." The transaction in Dry Dock Bank *v.* American Life Ins. & Trust Co., *supra*, was held to be usurious, on the ground that under color of an exchange, or a sale of securities, the object of the parties was a loan. In Leavitt *v.* De Lanny, 4 Comst. 364, it was held that a sale of credit, made in good faith at more than legal interest, was not usurious. As to a mutual exchange of notes, see Williams *v.* Banks, 11 Md. 198, citing Munn *v.* Commission Co., 15 Johns. 55; Sauerwein *v.* Brunner, 1 Harris & G. 477; Williams *v.* Reynolds, 10 Md. 57; Blodgett *v.* Wadhams, Hill & Denio, 65.

(*i*) Buckingham *v.* McLean, 15 How. 151; Grand Gulf Bank *v.* Archer, 8 Smedes & M. 451; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Merritt *v.* Benton, 10 Wend. 116; Marvine *v.* Hymers, 2 Kern. 223; Ontario Bank *v.* Schermerhorn, 10 Paige, 109. In

This is certainly legal, nor are we aware of any exact limits to it, other than those which usage may prescribe.

So, too, it has been held that a sale of depreciated paper for its face and legal interest is not usury, although the buyer, to make it cash, must at once lose a large sum on which he pays interest.(*j*)

Andrews *v.* Pond, 13 Pet. 65, 76, a bill of exchange was drawn in New York upon Mobile, in payment of a prior protested bill, for amount of this protested bill, together with the damages of protest and interest, and ten per cent for exchange between those places. In State Bank of Indiana *v.* Rodgers, 3 Ind. 53, where three fourths of one per cent was charged for exchange upon bills drawn in Lawrenceburgh upon Cincinnati, and the evidence showed that these places were only twenty-two miles distant from each other, and that two dollars would pay the cost of transporting one thousand dollars in specie between them, the court thought there was no evidence that the rate charged was exorbitant or illegal, for the cost of the transportation of specie is not the proper criterion to judge of the value of exchange. See also Planters' Bank *v.* Bivingsville Manuf. Co., 11 Rich. 677; Earll *v.* Mitchell, 22 Ill. 530; Orr *v.* Lacy, 4 McLean, 243; Leavitt *v.* De Launy, 4 Comst. 364. In Lee Bank *v.* Walbridge, 19 N. Y. 134, it was held that it was not usury for a banker in the interior of the State to discount a note made payable in the city of New York, with the purpose in both parties to enable the banker to realize a profit from a difference of exchange existing in fact and expected to continue. *Comstock*, J. said, that "the law does not, for any purpose affecting the construction or validity of the contract, acknowledge a difference in the value of money at different points within the territory of the State." But if it were made the condition of a loan, that the borrower should make his paper payable in a distant city for the purpose of charging a premium of exchange, it seems that this would be usurious. Seneca County Bank *v.* Schermerhorn, 1 Denio, 133. Where a person in New York agreed to borrow money of a resident of Georgia and to pay a part of the difference of exchange, although the funds were in New York previous to the loan, the transaction was held usurious. Jacks *v.* Nichols, 1 Seld. 178.

(*j*) Bank of U. S. *v.* Waggener, 9 Pet. 378; Boswell *v.* Clarksons, 1 J. J. Marsh. 47; Judy *v.* Gerard, 4 McLean, 360; Hayward *v.* Le Baron, 4 Fla. 404; Caton *v.* Shaw, 2 Harris & G. 13; Sizer *v.* Miller, 1 Hill, 227; U. S. Bank *v.* Owens, 2 Pet. 537. *Contra*, Maury *v.* Ingraham, 28 Missis. 171; Bondurant *v.* Commercial Bank, 8 Smedes & M. 533; Cook *v.* Bank of Lexington, id. 543. In Slosson *v.* Duff, 1 Barb. 432, it was held, that where the discount upon uncurrent money is very trifling, and the same passes in the market in the way of trade, its reception at par is no violation of the statute. In Gale *v.* Grannis, 9 Ind. 140, it was held that the taking of such depreciated paper is not usurious, unless the taking of it is made a condition of a loan of money, or is resorted to as a device to cover usury.

CHAPTER XIII.

OF ACTION.

TROVER may be brought for a note or bill, as well as for any other chattel; (*a*) and it will lie at the suit of one who is no party to the bill, if he have a right to the possession of it; (*b*) and it has been held that the plaintiff may recover on proof of his previous possession of the note, notwithstanding it is shown that the legal right to it, together with the right to sue for the money due thereby, is in another person. This action may be maintained at the suit of the payee, or the acceptor, or the indorser, against one who claims as assignee of the plaintiff by an agent, if the agent had no authority; (*c*) and the action will be maintained, although the defendant may sue his assignor on the bill.(*d*) But trover will not lie for bills of exchange indorsed in blank and deposited with a banker for collection, which he has pledged to a third person for his own debt.(*e*) The rule is otherwise where the bills are indorsed to an agent for the account of his principal.(*f*) If the defendant deliver the bill, the damages may be nominal, but with full costs to the time of the delivery.(*g*) If the plaintiff recovers in trover, the property in the note or bill is diverted from the plaintiff and vested in the defendant on payment or satisfaction of the judgment, and not

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(*a*) Treuttel *v.* Barandon, 8 Taunt. 100; Cranch *v.* White, 6 Car. & P. 767.

(*b*) Lowremore *v.* Berry, 19 Ala. 130.

(*c*) Goggerley *v.* Cuthbert, 5 Bos. & P. 170; Evans *v.* Kymer, 1 B. & Ad. 528.

(*d*) Goggerley *v.* Cuthbert, 5 Bos. & P. 170; Evans *v.* Kymer, 1 B. & Ad. 528; and see Cranch *v.* White, 1 Bing. N. C. 414, 1 Scott, 314, 6 Car. & P. 767.

(*e*) Collins *v.* Martin, 1 Bos. & P. 648.

(*f*) Treuttel *v.* Barandon, 8 Taunt. 100.

(*g*) Evans *v.* Kymer, 1 B. & Ad. 528. In Goggerley *v.* Cuthbert, 5 Bos. & P. 170, which was an action by an indorser after the bill was due, Lord Chief Justice *Mansfield* said: "As to the bill being worth nothing, it is of importance to the plaintiff to get it back again."

before.(*h*) And this change of the property will relate back to the time of the conversion.(*i*)

The actions of which we have to speak are, however, principally actions on the bill. And when the plaintiff has his option to sue on the note or bill or on the consideration for which it was given or transferred, it is almost always better to sue on the note or bill, because it proves itself to a considerable extent, defines the debt, and throws the burden of proof of payment on the defendant.(*j*) While, if the action be on the consideration, this is answered *prima facie* by showing that a bill was delivered, and the plaintiff must then prove dishonor.

There may be, however, a count on the bill and one upon the consideration also, and the plaintiff may have a verdict on both counts.(*k*) And an action may be sustained on the consideration, although the plaintiff has transferred the bills he received from the defendant to a third person, in whose hands they remained dishonored until just before the trial, when they were handed to the plaintiff.(*l*)

We shall proceed to consider, first, who may maintain an action on a note or bill; then, against whom it may be brought; and thirdly, at what time.

SECTION I.

WHO MAY MAINTAIN AN ACTION ON A NOTE OR BILL.

THE general rule is, that the person entitled to receive the contents of the bill is the then holder of it, and must bring the action upon it. Any one in possession of a bill or note payable to bearer, or indorsed in blank, even if he hold only as trustee (*m*)

(*h*) Cooper *v.* Shepherd, 3 C. B. 266; Holmes *v.* Wilson, 10 A. & E. 503; Cooper *v.* Willomatt, 1 C. B. 672.

(*i*) Cooper *v.* Shepherd, 3 C. B. 266.

(*j*) Hebden *v.* Hartsink, 4 Esp. 46; Bishop *v.* Rowe, 3 Maule & S. 362.

(*k*) Ryder *v.* Ellis, 8 Car. & P. 357.

(*l*) Burden *v.* Halton, 4 Bing. 454, 3 Car. & P. 174.

(*m*) Boardman *v.* Roger, 17 Vt. 589; *per Curiam*, Gage *v.* Kendall, 15 Wend. 640 Pearce *v.* Austin, 4 Whart. 489; and see Mauran *v.* Lamb, 7 Cowen, 174.

or pledgee,(*n*) is *prima facie* the holder and may sue, until his right is disproved.(*o*)

And it is no defence to an action on such paper that the property of it is in another person, and not in the plaintiff; and unless the possession of the latter is *mala fide*, and may work some prejudice to the defendant, the holder's title cannot be questioned.(*p*) This rule holds, even in regard to accommoda-

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(*n*) Bowman *v.* Wood, 15 Mass. 534: "The indorsement," say the court, "comprehended an authority to bring a suit, and to receive the money of the promisor." In Tarbell *v.* Sturtevant, 26 Vt. 513, it was held, in a suit against the maker of a note by a person who had received the same as collateral security from the payee, that evidence of a tender to the plaintiff of the amount due him from the payee was inadmissible. The plaintiff was entitled to recover, as against the maker, the whole amount of the note. In Manhattan Co. *v.* Reynolds, 2 Hill, 140, it was held that payment of the note by the maker to the payee subsequent to the indorsement was no defence in such case. And see Bancroft *v.* McKnight, 11 Rich. 663; Bank of Charleston *v.* Chambers, id. 657.

(*o*) Pettee *v.* Prout, 3 Gray, 502; Way *v.* Richardson, id. 412; McCann *v.* Lewis, 9 Calif. 246; Southwick *v.* Ely, 15 N. H. 541; Olcott *v.* Rathbone, 5 Wend. 490, 494; Agee *v.* Medlock, 25 Ala. 281; Guernsey *v.* Burns, 25 Wend. 411; Murray *v.* Judah, 6 Cowen, 484; Bolton *v.* Harrod, 9 Mart. La. 326, 344; Smith *v.* Burton, 3 Vt. 233; Thatcher *v.* Winslow, 5 Mason, 58, per *Story*, J.; Tarbell *v.* Sturtevant, 26 Vt. 513; Kunkel *v.* Spooner, 9 Md. 462; Jackson *v.* Heath, 1 Bailey, 355; O'Brien *v.* Sauls, 2 Rich. 332; Brigham *v.* Gurney, 1 Mich. 349; Mauran *v.* Lamb, 7 Cowen, 174. In Arbouin *v.* Anderson, 1 Q. B. 498, Lord *Denman*, C. J. said: "We must hold that the owner of a bill is entitled to recover upon it, if he has come by it honestly; and that fact is implied *prima facie* by possession." In Whiteford *v.* Burckmyer, 1 Gill, 127, 146, *Chambers*, J. said: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill will entitle the holder to sue." This *prima facie* right of action, based on possession, is not defeated by proof that the note upon which the holder sues was protested at the request of a bank, whose name was never on the note. Kunkel *v.* Spooner, 9 Md. 462. Or by proof that it came into the hands of the holder after it was due. James *v.* Chalmers, 5 Sandf. 52; Way *v.* Richardson, 3 Gray, 412. Or that the indorsement was "without recourse." Way *v.* Richardson. See also Worthington *v.* Curd, 15 Ark. 491; Owen *v.* Arrington, 17 id. 530; Sterling *v.* Bender, 2 Eng. Ark. 201.

(*p*) Way *v.* Richardson, 3 Gray, 412; Pearce *v.* Austin, 4 Whart. 489; Guernsey *v.* Burns, 25 Wend. 411; Ran *v.* Latham, 11 La. Ann. 276; Richardson *v.* Fenner, 10 id. 599; Agee *v.* Medlock, 25 Ala. 281; Aspinwall *v.* Meyer, 2 Sandf. 180; Brown *v.* Clark, 14 Penn. State, 469; Dean *v.* Hewit, 5 Wend. 257; Tarbell *v.* Sturtevant, 26 Vt. 513; Golder *v.* Foss, 43 Maine, 364; and see Goodman *v.* Harvey, 4 A. & E. 870; Arbouin *v.* Anderson, 1 Q. B. 498. And so in Moore *v.* Penn, 5 Ala. 135, it was said that evidence that the plaintiff has no interest in the note is irrelevant, unless a foundation is laid for its introduction, as, for instance, an offer to prove an offset against a third person, as the true owner of the note. And so in Whiteford *v.* Burckmyer, 1 Gill, 127, 145, *Chambers*, J. said: "Courts will never inquire whether a plaintiff sues for himself or as trustee for another; nor into the right of possession, unless on

tion paper, for the possession of it is still *prima facie* evidence of consideration and of title in the holder.(*q*) And it is now very strongly asserted that evidence of want of consideration between the original parties will not, in an action by an indorsee, throw upon him the burden of proving that he is a holder for value.(*r*) But if the defence relied upon be that of fraud or illegality at the inception of the paper, or that some illegal use has been made of it, and this is shown, the burden of proof is then, by the prevailing rule, on the holder, to show that he paid value for it.(*s*) But this rule is changed in some of the States.(*t*)

As the real party in interest, at law, means the party having the legal interest, it has been decided that the holder of a note not indorsed to him, nor assigned, nor negotiable by delivery,

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an allegation of *mala fides;* and blank indorsements may be filled up at the moment of the trial." And the same court reiterate these views in Ellicott *v.* Martin, 6 Md. 509, and Kunkel *v.* Spooner, 9 id. 462, 475. And see Gray *v.* Bank of Kentucky, 29 Penn. State, 365; Pearce *v.* Austin, 4 Whart. 489.

(*q*) In Millis *v.* Barber, 1 M. & W. 425, Lord *Abinger,* C. B. laid down this rule: "That where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill." And see Arbouin *v.* Anderson, 1 Q. B. 498; Goodman *v.* Harvey, 4 A. & E. 870; Way *v.* Richardson, 3 Gray, 412.

(*r*) See the remarks of *Martin,* J., in Ellicott *v.* Martin, 6 Md. 509, 515. And see also Knight *v.* Pugh, 4 Watts & S. 445; Gray *v.* Bank of Kentucky, 29 Penn. State, 365.

(*s*) Per Lord *Abinger,* C. B., in Millis *v.* Barber, 1 M. & W. 425, 432; Ellicott *v.* Martin, 6 Md. 509; Perrin *v.* Noyes, 39 Maine, 384; Gray *v.* Bank of Kentucky, 29 Penn State, 365; Fitch *v.* Jones, 5 Ellis & B 238, 32 Eng. L. & Eq. 134.

(*t*) It is provided that the action shall be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. This is so in New York, Code, §§ 111 and 113, 2 R. S., 4th ed., p. 499; Indiana, 2 R. S., p 27; Ohio, R. S. 1854, p. 629; Wisconsin, R. S. 1858, p. 714, § 12; Iowa, Code 1851, p. 247; Minnesota, Stats. Compiled 1858, p. 535; California, Wood's Dig. 1858, p. 168; Alabama, Code 1852, § 2129; Oregon, Stats Compiled 1855, p. 82; Missouri, R. C. 1855, p. 1217. And consequently where these statutes prevail, proof that the plaintiff has transferred the notes, and has no interest in them, defeats the action. Wilson *v.* Clark, 11 Ind. 385; Gillispie *v.* Fort Wayne & Southern R. R. Co, 12 id. 398; Hartshorn *v.* Green, 1 Minnesota, 92; Swift *v.* Ellsworth, 10 Ind. 205; Simons *v.* Waterman, 17 Ill. 371. And not only this, but the plaintiff must show affirmatively that he has the title in himself; he must connect himself with the note, — must prove title either as indorsee or as holder and owner. Parker *v.* Totten, 10 How. Pr. 233; Lord *v.* Chesebrough, 4 Sandf. 696.

cannot sue upon it in his own name, although the actual interest in it is in him.(*u*)

A blank indorsement of a bill or note, though not of itself an assignment of it, yet authorizes the party to whom it is delivered to fill up the indorsement to himself; and this, being requisite only as proof of his having the legal interest, may be done at any time before it is offered in evidence at the trial; (*v*) or such an indorsement may be stricken out.(*w*) But it is said that, if the indorsement be not filled up before verdict, the judgment will be bad.(*x*) If the note be indorsed in blank and delivered to a firm, either partner may fill the indorsement to himself, and sue.(*y*) And in such case, if one of the partners die, the rest need not sue as surviving partners.(*z*)

When several persons sue as indorsees of a bill or note indorsed in blank, they are not bound to prove any partnership, or that the transfer was made to them jointly; (*a*) but this is otherwise in case the paper is indorsed specially to the firm; (*b*) or

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(*u*) Farwell *v.* Tyler, 5 Iowa, 535; Allen *v.* Newberry, 8 Iowa, 65.

(*v*) Cope *v.* Daniel, 9 Dana, 415; Olcott *v.* Rathbone, 5 Wend. 490; Kennon *v.* M'Rea, 7 Port Ala 175; Agee *v.* Medlock, 25 Ala. 281; Guernsey *v* Burns, 25 Wend. 411; Kiersted *v.* Rogers, 6 Harris & J. 282; Parks *v.* Brown, 16 Ill. 454; Lovell *v.* Evertson, 11 Johns. 52; Edwards *v.* Scull, 6 Eng. Ark. 325; Fairfield *v.* Adams, 16 Pick. 381; Hance *v.* Miller, 21 Ill. 636 In the case of Vincent *v.* Horlock, 1 Camp. 442, Lord *Ellenborough* said that the filling of the blank indorsement, by writing a full and formal assignment to the holder, is only *expressio eorum quæ tacite insunt.* Day *v.* Lyon, 6 Harris & J. 140.

(*w*) Parks *v.* Brown, 16 Ill. 454; Kyle *v* Thompson, 2 Scam. 432; Burdick *v.* Green, 15 Johns. 247; Leavitt *v.* Cowles, 2 McLean, 491.

(*x*) Hudson *v.* Goodwin, 5 Harris & J. 115.

(*y*) Lovell *v.* Evertson, 11 Johns. 52. So also Murray *v.* Judah, 6 Cowen, 484.

(*z*) Attwood *v.* Rattenbury, 6 J. B. Moore, 579.

(*a*) Ord *v.* Portal, 3 Camp. 239; Rordasnz *v.* Leach, 1 Stark. 446. Where several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed in blank by another person, and, on the bill being dishonored, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser to recover the amount of the bill. Low *v.* Copestake, 3 Car. & P. 300. But in Machell *v.* Kinnear, 1 Stark. 499, it was held that where a bill indorsed in blank was delivered to A, B, & Co., bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, A and B, two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise. *Sed quære.*

(*b*) Attwood *v.* Rattenbury, 6 J. B. Moore, 579, per *Park*, J.

if it be made payable to a firm, all whose names constitute the firm must join in the action, unless it be distinctly proved that they have no interest.(*c*) And an indorsement by one partner in his individual name to his copartner, of a promissory note payable to both of them or order, will not enable the indorsee to sue thereon in his own name; although it might determine, as between the partners, to whom the money should belong when collected.(*d*)

Where a bill or note is made payable to a firm by the name of A & Co., A cannot recover thereon as payee without proof that he alone composed the nominal firm.(*e*) But where a note given to three payees was indorsed by two of them to the third and a stranger, and afterwards the third also indorsed to the stranger, the transfer to him was held good.(*f*)

An indorsee of a note made by a firm to one of its members or order may maintain an action thereon against the makers, although the promisee could not.(*g*) It is the promise of all to the order or appointee of one; and when the appointment is made by an indorsement, it is a valid contract with the indorsee.(*h*)

Where the maker of a note or the acceptor of a bill is appointed executor of the payee, if the debt was already due, such appointment discharges it, because it is considered as paid by the executor to himself, and it is therefore assets in his hands; and a subsequent indorsement of it will not enable the indorsee to sustain an action on it.(*i*) But it is held that, if it came into

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(*c*) Guidon *v.* Robson, 2 Camp. 302; Whitlock *v.* McKechnie, 1 Bosw. 427. See Bawden *v.* Howell, 3 Man. & G. 638.

(*d*) Estabrook *v.* Smith, 6 Gray, 570.

(*e*) Robb *v.* Bailey, 13 La Ann. 457; Ferguson *v.* King, 5 id. 642. And see Fletcher *v.* Dana, 4 Blackf 377; Desha *v.* Stewart, 6 Ala. 852.

(*f*) Goddard *v.* Lyman, 14 Pick. 268.

(*g*) Davis *v.* Briggs, 39 Maine, 304; Moore *v* Denslow, 14 Conn. 235; Thayer *v.* Buffum, 11 Met. 398; Smith *v.* Lusher, 5 Cowen, 688; Pitcher *v* Barrows, 17 Pick. 361. And see Smyth *v.* Strader, 4 How. 404; Allin *v.* Shadburne, 1 Dana, 68; Morrison *v.* Stockwell, 9 id. 172. These Kentucky decisions are inconsistent with the doctrine established elsewhere.

(*h*) Per *Shaw*, C. J., in Thayer *v.* Buffum, 11 Met. 398, and see Absolon *v.* Marks, 11 Q B 19; Moore *v.* Denslow, 14 Conn 235.

(*i*) Freakley *v.* Fox, 9 B. & C. 130. In Virginia, it is provided by statute that "the appointment of a debtor executor shall not extinguish the debt." Code, p. 543. And so held judicially in Mitchell *v.* Rice, 6 J. J. Marsh 628; Kent *v.* Somervell, 7 Gill & J. 271; and this must be considered the prevailing rule.

the hands of such executor before it was due, the right to sue upon it may be transferred with the property in it; and it is no objection to such transfer, or to an action brought by one claiming under it, that the party making it would have been incapacitated to sue if he had retained the paper till maturity.(*j*)

If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt upon a bill or note, though there be the same hand to receive and pay; yet if the executor has legal assets of the debtor and testator, it is an extinguishment. But if the assets in the executor's hands are not legal assets, presently available, but only equitable assets, and not available until the end of the year, it seems that an indorsement by him of the bill or note before the expiration of the year will pass the title to the same, and give the indorsee a right of action against the executor. The reason given for this is the distinction between legal and equitable assets. If an executor to whom his testator owes a debt has in his hand legal assets available in payment, he may favor himself so far as to pay the debt due to himself at once; but if the assets are only equitable, or not yet available, he has no right to make this application of them.(*k*)

Nor is possession necessary always; for one may sue on a bill then out in the hands of an indorsee, by showing that the indorsee holds it as the agent (*l*) or trustee (*m*) of the plaintiff.

(*j*) Harmer *v.* Steele, 4 Exch. 1, 12; and see Badeley *v.* Vigurs, 4 Ellis & B. 71.

(*k*) Lowe *v.* Peskett, 16 C. B. 500. This was an action upon a promissory note made by Richard Peskett, payable on demand to Charles Peskett, his son. Upon the death of Richard Peskett, he devised to Charles Peskett a freehold house charged with £240, to be raised within a year after his death, and paid to his executors for the liquidation of debts and legacies; and he made Charles Peskett and another son his executors. Charles Peskett took possession of the house, and afterwards indorsed the note to Lowe, who brought the present action against the executors, and it was held that he should recover.

(*l*) Hadwen *v.* Mendizabel, 10 J. B. Moore, 477.

(*m*) Stones *v.* Butt, 2 Cromp. & M. 416, 2 Dowl. 335. Where a plaintiff deposited a note on which he had commenced a suit, as security in the hands of a third person, and the depositary, having notice of such action, brings another action on the same instrument, the court will not stay the proceedings in the first action; but it seems that they would in the second. Marsh *v.* Newell, 1 Taunt. 109. And so it was held that, after the holder of a note has indorsed it in blank, and pledged it as collateral security, he can negotiate it to a third person, who can bring an action on it in his own name as indorsee, while it is still in the hands of the pledgee, and maintain it by producing the

When it is shown that the indorsement was for the purpose of collection, the cases are all agreed that the indorser may sustain a suit thereon in his own name, and it does not seem to be necessary to strike out the indorsement, either before or after the trial; but whether the possession merely of the bill or note by the indorser is sufficient evidence that it was indorsed for the purpose of collection only, is not uniformly determined by the cases.(*n*) But if the plaintiff has neither the possession of the

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note at the trial, the lien of the pledgee being previously discharged. Fisher *v.* Bradford, 7 Greenl. 28. Where the payee of a promissory note, which is in the hands of his attorney, indorses it *bona fide* to a third person, and leaves it in the attorney's hands for the use of the indorsee, the attorney thereby consents to hold it for the indorsee, and becomes his agent, and may bring an action on the note in the indorsee's name, with his sanction, though the indorsee never sees it. Richardson *v.* Lincoln, 5 Met. 201.

(*n*) In Dugan *v.* United States, 3 Wheat. 172, 182, *Livingston*, J. said: "If any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper." This decision overruled the earlier case of Welch *v.* Lindo, 7 Cranch, 159. To the same effect as Dugan *v.* United States, *supra*, see United States *v.* Barker, 1 Paine, C. C. 156; Bank of United States *v.* United States, 2 How. 711; Norris *v.* Badger, 6 Cowen, 449; Brinkley *v.* Going, 1 Breese, 288; Pitts *v.* Keyser, 1 Stew. Ala. 154; Bowie *v.* Duvall, 1 Gill & J. 175; Watervliet Bank *v.* White, 1 Denio, 608. In Wood *v.* Tyson, 13 La. Ann. 104, the court said, that "the older decisions in Louisiana certainly maintain the doctrine contended for by the appellant, that a special indorsement vests the title to the note in the indorsee, who alone has a right to sue. But this rule seems to have been always subject to exception where it appeared that the indorsee had been merely the agent of the party in whose name the suit was instituted." In Hart *v.* Windle, 15 La. 265, it was held, that, where the indorsement is a special one, the indorser must show title by a retransfer. The presumption resulting from the possession of the note is insufficient. If the indorsement was merely for the purpose of collection, this must be proved. In Dollfus *v.* Frosch, 1 Denio, 367, the doctrine of the preceding case was expressly dissented from, and it was held that in such case the plaintiff was entitled to recover without explaining the indorsements, or showing that they were made to create an agency for the purpose of collection. It was said that this point was settled by the case of Dugan *v.* United States, *supra*. This seems to be the better doctrine of the cases, although in most instances it is not necessary to rely upon this presumption of possession, because there is proof of the purpose of the indorsement. See Dann *v.* Norris, 24 Conn. 333; Manhattan Co *v.* Reynolds, 2 Hill, 140; Wright *v.* Boyd, 3 Barb. 523; Dickinson *v.* Burr, 15 Ark. 372; Leavitt *v.* Cowles, 2 McLean, 491; Bank of Utica *v.* Smith, 18 Johns. 230; Mottram *v.* Mills, 1 Sandf. 37; Chautauque County Bank *v.* Davis, 21 Wend. 584. See *contra*, Robson *v.* Earley, 13 Mart. La. 373; Sprigg *v.* Cuny, 19 id. 253.

paper nor any right to it by reason of any interest in it, he can not recover upon it.(*o*)

The legal interest, however, is sufficient to support the action, although the entire beneficial interest has been transferred.(*p*) And an agent who holds a bill or note payable to bearer, or indorsed in blank, or to whom it has been indorsed for the purpose of collection, may sue on it in his own name.(*q*)

And where the plaintiff, in an action on a note payable to a person named, or to bearer, was shown to be the general agent of the payee named, the production of the note by the agent was held sufficient evidence of his title, and it having been transferred to him before it was due, he took it subject to no equities or right of set-off which the maker would have against the original payee.(*r*) The pledgee of a bill or note, or one holding it as collateral security, to whom it has been indorsed, may maintain

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(*o*) Emmett *v.* Tottenham, 8 Exch. 884, 887; Olcott *v.* Rathbone, 5 Wend. 490; Bradford *v.* Bucknam, 3 Fairf. 15. And see Burden *v.* Halton, 4 Bing. 454.

(*p*) Poirier *v.* Morris, 2 Ellis & B. 89. An American house at Boston, Hovey, Williams, & Co., being indebted to the plaintiffs, a Paris house, instructed Coates & Co., a London house, indebted to the American house, to purchase a bill on Paris in favor of the plaintiffs; and the bill was purchased accordingly, but, in consequence of the bankruptcy of Coates & Co., payment was refused at maturity, except on paying the purchase-money; and Hovey, Williams, & Co. immediately remitted the amount of the bill and the expenses of the protest to the plaintiffs, but left the bill in their hands. It was held that the right of action was in the plaintiffs, although they were really suing on behalf of Hovey, Williams, & Co., whose credit was in no way pledged to the defendants. "They were clearly holders for value," said *Wightman*, J., "and I entertain no doubt they could sue, whatever was the state of things as between the defendants and Hovey, Williams, & Co. What has occurred since does not alter their legal right. They have been reimbursed; and the beneficial interest has been transferred; but the legal interest is in them; and they may still sue as trustees." That the right of action does not depend at all upon the equitable ownership, see De Cordova *v.* Atchison, 13 Texas, 372; Thompson *v.* Cartwright, 1 id. 87; Mauran *v.* Lamb, 7 Cowen, 174; Gage *v.* Kendall, 15 Wend. 640; Manhattan Co. *v.* Reynolds, 2 Hill, 140; Butler *v.* Robertson, 11 Texas, 142; Fowler *v.* Willis, 4 id. 46; Price *v.* Dunlap, 5 Calif. 483; Gray *v.* Wood, 2 Harris & J. 328.

(*q*) Little *v.* Obrien, 9 Mass. 423; Brigham *v.* Gurney, 1 Mich. 349; Sterling *v.* Marietta, &c. Trading Co., 11 S. & R. 179; Smith *v.* Burton, 3 Vt. 233; Glasgow *v.* Switzer, 12 Misso. 395; Webb *v.* Morgan, 14 id. 428; Beattie *v.* Lett, 28 id. 596; Fear *v.* Jones, 6 Iowa, 169; Royce *v.* Barnes, 11 Met. 276. *Contra*, see Thatcher *v.* Winslow, 5 Mason, 58, where it was held that a mere agent, to whom a note has been indorsed by his principal for collection, cannot sue as indorsee upon the note, although it be with the consent of his principal. *Story*, J. said: "Unless the plaintiff is a real holder of the note and has some interest in it, he cannot maintain an action as indorsee against the defendant." See Herrick *v.* Carman, 10 Johns. 224.

(*r*) Pettee *v.* Prout, 3 Gray, 502.

an action upon it; (*s*) but the mere depositary of it cannot, although it is payable to bearer.(*t*)

The mere possession of an unindorsed note, or of an indorsed note by one not the indorsee, is not evidence of authority to bring the action in the name of the payee or indorsee; (*u*) although it is still *prima facie* evidence of title in the holder.(*v*)

One to whom a note is neither indorsed nor assigned may sue it in the name of the payee, with his consent, especially if he has a beneficial interest in the note.(*w*)

Where a note is made for the purpose of raising money, and this is advanced by a third person instead of the payee, who never had any interest in it, it is held in some cases that an action cannot be maintained thereon against any of the parties to it in the name of the payee, even with his consent.(*x*)

Where such payee consents to become the agent and trustee of the person who advanced the money, by retaining the note for his security, the suit may be maintained in his name, and there is an implied consent to this which is irrevocable.(*y*)

Some of the cases make the distinction that the suit may be maintained in the name of the original payee on such paper against the principal maker, but not against the sureties.(*z*)

(*s*) Bowman *v.* Wood, 15 Mass. 534; Bank of Charleston *v.* Chambers, 11 Rich. 657. In the latter case, which was an action by an indorsee who held as collateral security, it was held that it was no defence that he had as yet sustained no actual loss, and had not given credit for the note to his immediate debtor. See also Manhattan Co. *v.* Reynolds, 2 Hill, 140; Sheldon *v.* Middleton, 10 Iowa, 17.

(*t*) Sherwood *v.* Roys, 14 Pick. 172.

(*u*) Parham *v.* Murphee, 16 Mart. La. 355.

(*v*) Parham *v.* Murphee, *supra*.

(*w*) Bragg *v.* Greenleaf, 14 Maine, 395; Amherst Academy *v.* Cowls, 6 Pick. 427; Merrifield *v.* Cobleigh, 4 Cush. 178; Stowe *v.* Hubbard, 7 id. 595; Bank of Chenango *v.* Hyde, 4 Cowen, 567. And this is so where the note is payable to one or bearer, or is indorsed by the payee in blank, as well as where the payee has delivered the note, without any indorsement. Gray *v.* Wood, 2 Harris & J. 328; Ware *v.* Key, 2 McCord, 373.

(*x*) Adams Bank *v.* Jones, 16 Pick. 574; Manufacturers' Bank *v.* Cole, 39 Maine, 188; Prescott *v.* Brinsley, 6 Cush. 233.

(*y*) Bank of Chenango *v.* Hyde, 4 Cowen, 567. In this case it was said that a court of equity would have compelled the bank to allow an action to be brought in their name, if they had refused. See the observations of *Wilde*, J. upon this case in Adams Bank *v.* Jones, 16 Pick. 574. See also Harriman *v.* Hill, 14 Maine, 127; Lime Rock Bank *v.* Macomber, 29 Maine, 564.

(*z*) Clinton Bank *v.* Ayres, 16 Ohio, 282. The action in this case was against the sureties, and it was held that it could not be maintained; but it was said that an action

And again, it is held that wherever the makers and sureties, either expressly or by necessary implication, consent to a different disposition of the paper from what was originally intended, they cannot object to a suit in the name of the party who is made payee thereon; and the fact that the paper was made to raise money upon is held to imply such consent.(*a*) It has also been held that the holder of such paper may declare upon it as made payable to himself by the name of the payee.(*b*)

Receivers or assignees of a bank may sue a note indorsed in blank, which they hold as receivers, and it is not necessary to allege that they so hold it.(*c*) So may trustees generally; (*d*) or an executor or administrator, if the note be to bearer, or be

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would lie against the principal in the note, if sued separately. The cases in New York in which the action has been sustained against the sureties in like instances are expressly dissented from, and declared not to be sustainable upon principle; because the surety might be willing to become surety for his principal to one person, when he would be utterly unwilling to have his note in the hands of another. See Manufacturers' Bank *v.* Cole, 39 Maine, 188; Skowhegan Bank *v.* Baker, 36 id. 154; Dewey *v.* Cochran, 4 Jones, N. Car. 184. The same course of reasoning is used in these cases as in the Ohio case cited above, although they do not agree with that in any expression that the suit could be maintained against the principal. And see Granite Bank *v.* Ellis, 43 Maine, 367, where it was held that, if the principal sells the note to a third person, not the payee, without the express or implied consent of the sureties, they are not liable; but it was said that the principal is liable on an action in the name of the payee.

(*a*) Elliot *v.* Abbot, 12 N. H. 549; Cross *v.* Rowe, 2 Foster, 77, per *Eastman*, J.: "It was a negotiable note, and whether the bank advanced the money upon it, or an individual, or whether it was taken as payment for money and held till it matured, it could not vary their (the sureties') liability upon it. It has not followed, perhaps, the precise channel that was anticipated, but it has not been turned from a strictly legal channel." See also Bank of Newbury *v.* Rand, 38 N. H. 166; Commercial Bank of Natchez *v.* Claiborne, 5 How. Miss. 301. The decision in this last case, and like decisions in other cases, have been based upon the authority of several New York cases, in which it is said that, where the note is made to raise money upon it, it is immaterial with the makers and sureties who advances it. Powell *v.* Waters, 17 Johns. 176; Bank of Rutland *v.* Buck, 5 Wend. 66; Utica Bank *v.* Ganson, 10 id. 314; Barrick *v.* Austin, 21 Barb. 241.

(*b*) Hunt *v.* Aldrich, 7 Foster, 31. A note made payable to the Cheshire Bank or order, to raise money upon, was discounted by a third party, and was never held by the bank nor indorsed by it to any one. The note was declared on as payable to the plaintiff, who advanced the money, by the name of the Cheshire Bank, and it was held that the action could be maintained. And so Elliot *v.* Abbot, 12 N. H. 549, per *Parker*, C. J.; Bank of Newbury *v.* Rand, 38 N. H. 166, per *Eastman*, J.

(*c*) Haxtun *v.* Bishop, 3 Wend. 13.

(*d*) Smith *v.* Kendal, 1 Esp. 231, 6 T. R. 123; Randoll *v.* Bell, 1 Maule & S. 714; Jackson *v.* Heath, 1 Bailey, 355; Bowman *v.* Wood, 15 Mass. 534; Boardman *v.* Roger, 17 Vt. 589.

indorsed in blank by the deceased; (*e*) even if the note be payable to him "as administrator." (*f*)

The donee *causa mortis* of a negotiable note, payable to the donor or order, but not indorsed, may maintain an action thereon in the name of the administrator of the donor, and this even if such administrator, when the case comes to trial, appears and protests against it. (*g*)

Upon a bill or note made payable to a wife during coverture, the husband and wife may join in an action; (*h*) or the husband may declare alone on it, alleging it was payable to him. (*i*)

(*e*) Barrett *v.* Barrett, 8 Greenl. 353; Robinson *v.* Crandall, 9 Wend. 425; Brooks *v.* Floyd, 2 McCord, 364; Walter *v.* Kirk, 14 Ill. 55; Gilman *v.* Horseley, 17 Mart. La. 661; Alston *v.* Jackson, 4 Ired. 49. But where the distributees of an estate, to avoid the expenses of an administration, appointed agents to settle the estate, and delivered to them a note payable to bearer, which belonged to the intestate, it was held that such agents could not sue on the notes in their own names. Richardson *v.* Gower, 10 Rich. 109. A bill of exchange indorsed generally was delivered to S. C., as the administratrix of J. C., for money due to her intestate. The money not having been received by her in her lifetime, the administrators *de bonis non* of J. C. maintained an action against the acceptor of the bill for the amount thereof. Catherwood *v.* Chabaud, 1 B. & C. 150. It was observed by *Best*, J., that "it is not necessary to decide that the administrator of the administratrix S. C. could not have sued; it is sufficient to say, that the administrator *de bonis non* might sue; and this observation may serve to reconcile the various cases which have been referred to. An action by the administrator *de bonis non* was certainly the most proper, that being the shortest and most convenient mode of bringing the money recovered into the funds of the original intestate." *Abbott*, C. J.: "There is much weight in the distinction which has been taken by my brother *Best*. There may be cases where the administrator of an administrator might and ought to sue; viz. if the first administrator had made himself debtor to the intestate's estate for the amount of a bill received in payment of a debt due to that estate." See Eure *v.* Eure, 3 Dev. 206.

(*f*) De Cordova *v.* Atchison, 13 Texas, 372; Barnes *v.* Modisett, 3 Blackf. 253, per *Stevens*, J.: "This debt is due to the plaintiff in his personal capacity, and not *in autre droit*, and he might have sued in his own right, without describing himself administrator, &c., and his having named himself administrator, &c. in the note, and in the action, was surplusage, and should be rejected as such." Where the payee of a bill of exchange indorsed it to A and B, *as executors*, it was held that they might, or indeed, must, declare as such in an action against the acceptor. King *v.* Thom, 1 T. R. 487. "It must," said *Ashurst*, J., "be taken for granted that the indorser was indebted to the testator, and to the plaintiffs as executors, and so he might indorse to the plaintiffs, as such executors. Then they held the bills as executors, and, upon the acceptors refusing to pay it, they may declare upon the right in which they hold it." See Sasseer *v.* Walker, 5 Gill & J. 108.

(*g*) Bates *v.* Kempton, 7 Gray, 382; Sessions *v.* Moseley, 4 Cush. 87; Grover *v.* Grover, 24 Pick. 261; Borneman *v.* Sidlinger, 15 Maine, 429; Brown *v.* Brown, 18 Conn. 410.

(*h*) Philliskirk *v.* Pluckwell, 2 Maule & S. 393; Gaters *v.* Madeley, 6 M. & W. 423; Howard *v.* Oakes, 3 Exch. 136; Young *v.* Ward, 21 Ill. 223.

(*i*) Burrough *v.* Moss, 10 B. & C. 558; Arnold *v.* Revoult, 4 J. B. Moore, 66,

In an action on a note made payable to a *feme covert* or bearer, the husband may declare on it as bearer; (*j*) and upon one payable to the husband or the wife in the alternative, the husband should sue as payee, as he is such in legal effect.(*k*)

When the husband sues alone on a promissory note given to his wife, a debt due to the maker from her, *dum sola*, cannot be set off.(*l*)

On an obligation given to her, *dum sola*, the husband must join her in the action; (*m*) and the right of action after her death is in her administrator, and not in the husband.(*n*)

A married woman cannot maintain an action against her husband on a note which he has executed to her during coverture; (*o*) nor can she sue on a joint and several note made payable to her by her husband and two other persons; (*p*) yet in this case the right of action survives to her upon the death of the husband, and she may sue the other makers.(*q*) And in case a note is made payable to a husband and wife, if she survive him, the right is not in his administrator, but in her; (*r*) and so if the note were payable to the wife alone.(*s*) No one

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1 Brod. & B. 443; Ankerstein *v.* Clarke, 4 T. R. 616; Gaters *v.* Madeley, 6 M. & W. 423. And see Shuttlesworth *v.* Noyes, 8 Mass. 229; Commonwealth *v.* Manley, 12 Pick. 173; Wintercast *v.* Smith, 4 Rawle, 177. And so in the case of Sutton *v.* Warren, 10 Met. 451. This is not so when he has *authorized* the note to be payable to the wife by name. Howard *v.* Oakes, 3 Exch. 136.

(*j*) Fort *v.* Brunson, 2 Speers, 658.

(*k*) Young *v.* Ward, 21 Ill. 223.

(*l*) Burrough *v.* Moss, 10 B. & C. 558.

(*m*) Sherrington *v.* Yates, 12 M. & W. 855, overruling M'Neilage *v.* Holloway, 1 B. & Ald. 218.

(*n*) Hart *v.* Stephens, 6 Q. B. 937.

(*o*) Sweat *v.* Hall, 8 Vt. 187.

(*p*) Richards *v.* Richards, 2 B. & Ad. 447.

(*q*) Richards *v.* Richards, *supra*.

(*r*) Draper *v.* Jackson, 16 Mass. 480; May *v.* Boisseau, 12 Leigh, 512; Perkins *v.* Clements, 1 Patton & H. 141.

(*s*) Dean *v.* Richmond, 5 Pick. 461, 468; Stanwood *v.* Stanwood, 17 Mass. 57; Draper *v.* Jackson, 16 id. 480. In Kentucky it has been held that a promissory note, executed to the wife during coverture, upon her death survived to her husband, *as husband*. Jones *v.* Warren, 4 Dana, 333. See also Wintercast *v.* Smith, 4 Rawle, 179; Hayward *v.* Hayward, 20 Pick. 517. As long ago as 1755, Lord *Hardwicke* laid down the rule, that, "whenever a chose in action comes to the wife, whether vesting before or after the marriage, if the husband dies in life of the wife, it will survive to the wife; with this distinction, that, as to those which come during the coverture, the husband may for them bring the action in his own name, may disagree to the interest of the

but the payee can bring an action in his own name until the payee indorses the paper.(*t*) It may not be quite certain that this rule applies to assignees of an insolvent, who hold unindorsed paper, so as to prevent their maintaining an action upon it in their own names. This might depend upon statutory provisions.(*u*)

If, however, a note be issued with a blank space for the name of the payee, a *bona fide* holder may fill it with his own name, and bring an action upon it as payee.(*v*)

Notes payable to the order either of a fictitious person or the maker, and negotiated by the maker, have the same validity against the maker and all persons having knowledge of the facts as if made payable to bearer; and the holder may recover on them as such notes.(*w*)

But the burden of proof is on the holder, who relies upon the payee being a fictitious person, to prove that fact. And the holder should have transferred the paper by delivery only, or by

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wife; and that recovery in his own name is equal to reducing into possession." Garforth *v.* Bradley, 2 Ves. Sr. 675.

(*t*) Hooker *v.* Gallagher, 6 Fla. 351; Templin *v.* Krahn, 3 Ind. 373; Fahnestock *v.* Schoyer, 9 Watts, 102; per *Dewey*, J. in Estabrook *v.* Smith, 6 Gray, 570; Pease *v.* Hirst, 10 B. & C. 122; Allen *v.* Ayers, 3 Pick. 298. This case was an action on a note payable to a bank, and which the bank refused to discount. The maker delivered the note to the plaintiff. It was held, that, the maker being liable by the terms of the note only to the bank or their assignees, the action could not be sustained.

(*u*) Freeman *v.* Perry, 22 Conn. 617; Cartwright *v.* Gardner, 5 Cush. 273; Drury *v.* Vannevar, 5 Cush 442; Stone *v.* Hubbard, 7 Cush. 595; Buckner *v.* Real Estate Bank, 5 Pike, 536. But in Pitts *v.* Holmes, 10 Cush. 92, it was held that the action might be maintained in the name of the assignee of the original payee, who had become insolvent. The language of the statute concerning the transfer of the property of the insolvent debtor to his assignee is exceedingly comprehensive and absolute, giving him the right to recover the debts in his own name, and the assignment being made conclusive evidence of the assignee's authority to sue. *Cushing*, J., delivering the opinion of the court, after referring to the cases of Stone *v.* Hubbard, and Drury *v.* Vannevar, *supra*, said: "The disposition of the court has been, as in the present case, to protect the *bona fide* holder of a chose in action, so far as the same may be done compatibly with technical principles of law and the rights of other persons; and the result of the whole is, to settle, that a promissory note or bill may be sued in the name of the assignee of the insolvent debtor, or of the original payee, or of any *bona fide* indorsee or assignee, subject to all the appropriate equities."

(*v*) Cruchley *v.* Clarence, 2 Maule & S. 90.

(*w*) R. S. of New York, 4th ed., Vol. II. p. 178; Wisconsin, R. S., ch. 60, § 3, p. 409; Missouri, Code, 1855, Vol. I. p. 297; Michigan, Compiled Statutes, 1857, Vol. I. p. 409; California, Wood's Dig. 1858, p. 72, Art. 181. And see Foster *v.* Shattuck 2 N. H. 446; Elliot *v.* Abbot, 12 id. 549.

his own indorsement, if any, and not by indorsing it in the name of the fictitious payee.(*x*)

In several of the States there are statutes authorizing one who is assignee of negotiable paper before it is due, to sue thereon in his own name, subject to the equities existing against the original assignor before the defendant had notice of the assignment.(*y*)

From the general rule, that the party entitled to sue is the one in whom the paper itself shows the legal title to be, it follows that upon a bill or note payable to a person by name, although described therein as the agent of another, who is also named, the action should be brought in the name of the person so described as agent, or in that of his indorsee,(*z*) though the

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(*x*) Maniort *v.* Roberts, 4 E. D. Smith, 83. And see Central Bank of Brooklyn *v.* Lang, 1 Bosw. 202.

(*y*) Indiana, R. S. 1852, ch. 77, § 3, Vol. I. p. 378; Arkansas, Dig. of Statutes 1858, ch. 15, § 3; Mississippi, Code, 1857, p. 355; Texas, Oldham and White's Dig. p. 51. And so perhaps in other States. But it is held that the assignee cannot maintain the action without indorsement. Bradley *v.* Trammel, 1 Hempst. 164. And where it is provided that the real party in interest may sue in his own name, the action can be maintained in the name of the holder of a note transferred to him merely by delivery. Bocka *v.* Nuella, 28 Misso. 180; Bennett *v.* Pound, id. 598; Savage *v.* Bevier, 12 How. Pr. 166; Billings *v.* Jane, 11 Barb. 620. It seems, however, that a note transferred in that way will be subject to every defence which the maker had against it at the time of, or before, notice of the transfer. Cases *supra*. Upon a non-negotiable note transferred merely by delivery, an action cannot be maintained in the name of the holder. Bennett *v.* Pound, 28 Misso. 598.

(*z*) Buffum *v.* Chadwick, 8 Mass. 103. In Fisher *v.* Ellis, 3 Pick. 322, upon a note given "to Willard Gay, Esquire, Treasurer of the Third Parish in Dedham," &c., "or his successor in said office," it was held that an action might be sustained thereon by his successor. It was intimated in this case that the action might also be maintained in the name of the corporation. And so a note payable to the plaintiff "as treasurer of the proprietors of the new meeting-house in Nobleborough, or his successor in said office," was properly sued by the payee in his own name. See Clap *v.* Day, 2 Greenl. 305. In Commercial Bank *v.* French, 21 Pick. 486, 491, *Morton*, J. remarked, that, if the note had been made to the cashier by name, the addition of "Cashier of the Commercial Bank" might have been regarded as *descriptio personæ*. A note payable to "Ebenezer Whitcomb, P. S. of Adelphian Lodge, No. 42," was held properly sued in the name of the payee. The words added to his name were merely descriptive of the person, and constituted no objection to the maintenance of the suit. Whitcomb *v.* Smart, 38 Maine, 264. And so it was held that a note to "James L. Evans, guardian of the estate of George Reetor," &c., was properly sued by Evans; that the face of the note showed that he was the real party in interest, and that the words "guardian," &c. should be regarded as surplusage or as *descriptio personæ*. Shepherd *v.* Evans, 9 Ind. 260. So a note payable to "C. E. M'Ewen, agent for the executors of Joseph Branch, dec.," was held to vest the legal title in such agent, who must sue in his own name. The words "agent," &c. only show that the executors

decisions on this point are not uniform; and *a fortiori* if it is payable to one who is in fact an agent or factor, without any mention of such agency, the right of action is in the payee.(*a*)

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of Branch have a beneficial interest in the note. Cocke *v.* Dickens, 4 Yerg. 29. On a similar note there was a like decision in Rutherford *v.* Mitchell, Martin & Y. 261. In Rose *v.* Laffan, 2 Speers, 424, a note payable to "A. G. Rose, cashier," was held to vest the legal interest in Rose; and *Frost*, J., delivering the opinion of the court said: "Even if it had been expressed in the bill to have been payable to the plaintiff, — 'cashier of the bank of Charleston,' — the legal interest would still be in him." It was remarked in Alston *v.* Heartman, 2 Ala. 699, 701, that, where there is nothing on the face of the writing to show that a corporation whose name is mentioned is a party to the contract, the action must be brought in the name of the agent or officer who takes the legal interest. In Van Ness *v.* Forrest, 8 Cranch, 30, where a commercial company, consisting of four or five hundred members, sold merchandise the property of the company, and took from the purchaser his note for the purchase-money, payable to Joseph Forrest, president of the commercial company, it was held that an action on the note should be in the name of such promisee, against the maker of the note and his dormant partner, notwithstanding such dormant partner was also a partner of the commercial company. *Marshall*, C. J., delivering the opinion of the court, said: "Although the original cause of action does not merge in this note, yet a suit is clearly sustainable on the note itself. Such suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company than if it had been given to a person not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money, in his own name, as a trustee for the company. Upon the record, and technically speaking, he is the sole plaintiff, and the court can perceive no reasonable or legal objection to his sustaining an action on the note." A note payable to "William Thomas, school commissioner and agent for the inhabitants of the county of Morgan," &c., was held to vest the legal title in the payee, and it was thought that the action could be brought only in his name. McConnel *v.* Thomas, 2 Scam. 313. In Ramsey *v.* Anderson, 1 McMullan, 300, it was held that a note payable to the treasurer of an incorporated company must be sued in the name of the person who happens to be treasurer, and cannot be sued in the name of the company. Harrow *v.* Dugan, 6 Dana, 341, was an action on a note in this form: "I have borrowed from A. Myers $136, which money was loaned me by said Myers as agent for H. Dugan for the benefit of my father. J. Harrow." As the note showed on its face that the borrowed money was the property of Dugan, and that Myers, from whose hand it was received, made the loan as the agent of Dugan, the court thought that the legal import of the note was that the money was borrowed from him, and therefore that the promise of repayment was to him; and the action was sustained in his name. But, on the other hand, in the case of Trustees of Ministerial and School Fund in Levant *v.* Parks, 10 Maine, 441, it was held that a note made payable to "George Waugh, Treasurer of the Ministerial and School Fund in Levant, or his successor in office," was rightly sued in the name of such corporation. It was contended that the action should have been brought in the name of Waugh; and the court said that they did not say that it might not have been so brought. In Southern Life Insurance & Trust Co. *v.* Gray, 3 Fla. 262, it was held that a note payable to "James Ruon, agent of the Southern Life and Trust Co.," might be sued by the corporation, upon proof that the property in it was theirs.

(*a*) West Boylston Manuf. Co. *v.* Searle, 15 Pick. 225. In this case a factor took

Where a bill or note is made payable to A. B., described as agent, cashier, treasurer, president, or the like, without naming the principal, the person so described as agent is the one entitled to sue, and evidence *aliunde* will not be admitted to show who the principal is.(*b*)

But where a bill or note is payable to the cashier or other officer of a corporation mentioned, without naming the officer, the principal who is named, rather than the agent who is not named, has the right of action.(*c*) Upon a bill or note payable to A, for the use of B, the right of action is in A only, who has the legal interest.(*d*)

But where bills or notes are made payable to an officer or agent of the United States or other government, and it appears from the face of the instruments, and from evidence *aliunde*,

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the note in his own name for goods sold on account of his principal. "The legal interest," said *Shaw*, C. J., "is in the payee or his indorsee. If the principal is in a condition to declare on the contract for goods sold, treating the note as a nullity, or as a mere collateral security, not amounting to payment, he might probably recover in his own name. But if he declare on the note in the name of the promisee, as being the *cestui que trust*, and beneficially interested, or if he declares as indorsee, through the indorsement of such payee, he must take subject to such matters of discharge and defence as the promisors would be able to make against the original payee, through whom he would claim."

(*b*) Bank of U. S. *v.* Lyman, 20 Vt. 666. This was an action in the Circuit Court of the United States upon a note payable to "Samuel Jaudon, Esquire, cashier, or order." "The promise, therefore," said *Prentiss*, J., "is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to allow the Bank of the United States, or any one else, without his order, to demand and enforce payment of it by suit." See Van Ness *v.* Forrest, 8 Cranch, 30. In Fairfield *v.* Adams, 16 Pick. 381, the bill was indorsed to "Seth S. Fairfield, cashier." "This vests the legal title in the plaintiff," said *Shaw*, C. J., "and it is no ground of defence, that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account for the proceeds to another." And so in Horah *v.* Long, 4 Dev. & B. 274, a note payable to "William H. Horah, cashier, or order," was held payable to him individually. The word "cashier" was but descriptive of the person. So also Rose *v.* Laffan, 2 Speers, 424; McHenry *v.* Ridgely, 2 Seam. 309.

(*c*) Commercial Bank *v.* French, 21 Pick. 486; Alston *v.* Heartman, 2 Ala. 699. In Medway Cotton Manufactory *v.* Adams, 10 Mass. 360, it was decided that a note payable to Richardson, Metcalf, & Co., might well be declared on as a promise to The Medway Cotton Manufactory, on the ground that this was only a variance of name.

(*d*) This was determined in the very early case of Evans *v.* Cramlington, Carth. 5, affirmed in the Exchequer Chamber, Cramlington *v.* Evans, 2 Ven. 307. See Dugan *v.* United States, 3 Wheat. 172. In Barry County *v.* McGlothlin, 19 Misso. 307, it was held that a suit might be maintained in the name of a county upon a note payable to the county for the use of the State school fund.

that they are for the benefit of such government, the action may be brought in its name.(*e*)

A distinction seems to be taken in some cases to the effect that a note or bill, made payable or indorsed to an agent or officer of a company not incorporated, may be sued in the name of such agent or officer; but that one payable to an incorporated company may be sued by the company in its corporate name.(*f*)

In Vermont, it is settled by adjudication that the person beneficially interested in a note may maintain an action thereon in his own name.(*g*)

(*e*) Dugan *v.* United States, 3 Wheat. 172. A bill of exchange had been indorsed to Thomas T. Tucker, Esq., treasurer of the United States, or order. It was indorsed by him to another, but came back to his hands in consequence of a protest for non-payment; and a suit was instituted on it against a prior indorser in the name of the United States. Held, that the suit was properly brought. On the authority of this case, it was held in United States *v.* Boice, 2 McLean, 352, that on a note payable to Levi Woodbury, secretary of the United States, or to his successors in office, suit might be brought in the name of the United States. So also United States *v.* Barker, 1 Paine, C. C. 156. In State *v.* Boies, 2 Fairf. 474, it was held that upon a note payable to "James Irish, Land Agent of Maine," the suit was well brought in the name of the State. *Mellen*, C. J. said: "We perceive no distinction in principle between this case and that of Irish *v.* Webster, 5 Greenl. 171. In that case the note was not negotiable; in the present case it is so. The principal ground is, that the land agent is the servant of the State, making contracts in behalf of the State. A note made payable to such an agent is, in legal contemplation, payable to the State."

(*f*) This distinction was spoken of in Dupont *v.* Mount Pleasant Ferry Co., 9 Rich. 255. It was thought by the court in this case, that a note to "Charles Jugnot, President M. P. F. Co.," might be sued by the company in its corporate name. In McConnel *v.* Thomas, 2 Scam. 313, a note was made payable to "William Thomas, school commissioner and agent for the inhabitants of the county of Morgan, for the use of the inhabitants of township number fifteen," &c. *Wilson*, C. J. remarked that, "if the payee of this note cannot sue because of the want of interest in it, it may well be doubted whether any one can, for the same objection applies to the county; and the inhabitants of the township, not being a corporation, cannot sue in that character; and no one of them can enforce the common rights of all." And see Southern Life Ins. & Trust Co. *v.* Gray, 3 Fla. 262. A note was executed to G., "agent of Wells County, or his successor in office," &c. Held, that G.'s successor could not sue in his own name upon the note, because the county agent cannot be regarded *quasi* a corporation. Upton *v.* Starr, 3 Ind. 508.

(*g*) Arlington *v.* Hinds, 1 D. Chip. 431; Rutland & Burlington R. R. Co. *v.* Cole, 24 Vt. 33. See Middlebury *v.* Case, 6 Vt. 165; Bank of Manchester *v.* Slason, 13 id. 334. The case of Binney *v.* Plumley, 5 id. 500, indicates that a suit might also be maintained in the name of the person to whom the note is in terms payable. In Johnson *v.* Catlin, 27 Vt. 87, it was held that, where a bill or note is made payable to one as "agent," or "cashier," without naming his principal, he may maintain an action in his own name. *Bennett*, J., delivering the opinion of the court, said: "Though this court have been repeatedly called upon to repudiate the case of Arlington *v.* Hinds, as being a departure from the principles of the law merchant, they have hitherto declined"

A sale by the payee without his indorsement is so full an authority for an action by the purchaser in the name of the payee, that a discharge by the payee, subsequent to the sale and notice, will not bar the action.(*h*)

If the payee of a note not negotiable put his name on the back of it, intending to transfer it, he authorizes the prosecution of a suit in his name, for there is no other way of making the assignment effectual.(*i*) But when the payee of a negotiable note indorses it, he parts with all property in it, and all control over it, and without his consent no action can be maintained upon it in his name.(*j*) And an objection to such use of his name may be raised by the defendant, as well as by the payee or indorsee, whose name has been usurped.(*k*)

An indorser of a bill or note has no right to sue any prior party until he has paid the same, at least in part.(*l*) But he may pay it by giving his own note for it.(*m*) So he may pay it as it were indirectly; as when judgment was recovered against maker and indorsers, and one of the indorsers directed the sheriff to attach certain property as of the maker, and gave him a bond of indemnity which he was obliged to pay, this was considered as a payment of the note, which authorized him to sue a prior indorser.(*n*) But it is not sufficient that the indorser has acknowledged his liability, and agreed upon the mode in which he will make the payment.(*o*) Nor can the drawer of a bill recover upon it against the acceptor without evidence that he has paid the bill; (*p*) and the striking out of the payee's indorsement is no evidence of this.(*q*)

But if the drawer of a bill, payable to his own order, pay the

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(*h*) Burton *v.* Dees, 4 Yerg. 4; Amherst Academy *v.* Cowls, 6 Pick. 427; Titcomb *v.* Thomas, 5 Greenl. 282; Matlack *v.* Hendrickson, 1 Green, N. J. 263.

(*i*) *Per Curiam*, Mosher *v.* Allen, 16 Mass. 451.

(*j*) Mosher *v.* Allen, 16 Mass. 451; Skowhegan Bank *v.* Baker, 36 Maine, 154.

(*k*) Coleman *v.* Biedman, 7 C. B 871. See Thames Haven Dock, &c. Co. *v.* Hall, 5 Man. & G. 274. But see Doe *v.* Figgins, 3 Taunt. 440.

(*l*) Hoyt *v.* Wilkinson, 10 Pick. 31; Arnold *v.* Bureau, 7 Mart. La. 287. See Bullard *v.* Wilson, 17 Mart. La. 196.

(*m*) Bullard *v.* Wilson, 17 Mart. La. 196.

(*n*) Tucker *v.* Pruett, 4 Yerg. 553.

(*o*) Longfellow *v.* Andrews, 45 Maine, 75.

(*p*) Thompson *v.* Flower, 13 Mart. La. 301. See Simmonds *v.* Parminter, 1 Wils. 185; Coursin *v.* Ledlie, 31 Penn. State, 506; Merrills *v.* Swift, 18 Conn. 257.

(*q*) Thompson *v.* Flower, 13 Mart. La. 301.

bill to the holder at maturity, the latter may sue the acceptor thereon, as trustee for the drawer.(*r*)

An indorsee of a note cannot sue his immediate indorser without showing that he has credited him for the amount or otherwise paid him; but he may sue a prior party.(*s*)

Where a principal and a surety signed a note to accommodate the payee, and the surety paid it and sued the principal, who died insolvent, and the surety's claim against the insolvent was allowed by the commissioners, the administrators of the principal maintained an action against the payee.(*t*)

If the action be brought in the name of an indorsee wholly without his knowledge, he may subsequently assent, whether he has any interest in the note or not.(*u*) If, after the action begins, the holder and plaintiff indorses the note over, it seems that this discharges the action.(*v*) And it has even been held that, where a negotiable note, indorsed in blank, is transferred by delivery during the pendency of a suit thereon, so that the legal title to it vests in the party to whom it is transferred, the action cannot be further maintained.(*w*) But the transfer might have been made with an agreement that the action should continue for the benefit of the transferee; (*x*) and that, we think, might perhaps be presumed, in the absence of evidence.

Where an action is brought by the payee of a note against the principal and surety, and the latter purchases the note and takes an assignment of the action, this is not defeated as against the

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(*r*) Williams *v.* James, 15 Q. B. 498.

(*s*) Bolton *v.* Harrod, 9 Mart. La. 326.

(*t*) Hoyt *v.* Wilkinson, 10 Pick. 31.

(*u*) Marr *v.* Plummer, 3 Greenl. 73; Golder *v.* Foss, 43 Maine, 364; Lewis *v.* Hodgson, 17 Maine, 267.

(*v*) Lee *v.* Jilson, 9 Conn. 94. "The action must be commenced and sustained by him who has the legal interest," per *Daggett*, J. The court refrain from saying what might have been the effect of an agreement on the part of the assignee of the note, that the suit should be prosecuted in the name of the payee. And see Hall *v.* Gentry, 1 A. K. Marsh. 555.

(*w*) Curtis *v.* Bemis, 26 Conn. 1.

(*x*) In Curtis *v.* Bemis, 26 Conn. 1, it was held that such an agreement had no effect in a case where the legal title to the note was transferred by the delivery of the note during the pendency of the suit. And see Central Bank *v.* Curtis, 26 Conn. 533; Lee *v.* Jilson, 9 Conn. 94. In States where it is required by statute that the action shall be prosecuted in the name of the real party, which at law is held to mean the party having the legal interest, the suit cannot be prosecuted in accordance with any such agreement. Allen *v.* Newberry, 8 Iowa, 65.

principal, but may be proceeded with in the name of the original plaintiff.(*y*)

The use of a fictitious name, or the name of a third party, may not defeat an action, but it would be a circumstance to attach suspicion to the plaintiff's title.(*z*)

Where there are several indorsers, any one of them may sue the acceptor or drawer of the bill, or maker of the note, in pursuance of any arrangement among themselves, the plaintiff striking out all the names upon the paper below his own.(*a*)

An indorser of a note, or acceptor of a bill for honor of indorser or drawer, or a drawer, by payment of the note or bill, becomes holder of it, and may sue, but he holds it not as the transferee of the party for whom he pays, or to whom he pays, but in his own original capacity.(*b*) And the

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(*y*) Low *v.* Blodgett, 1 Foster, 121 ; Rockingham Bank *v.* Claggett, 9 id. 292.

(*z*) Golder *v.* Foss, 43 Maine, 364, was an action upon a note indorsed in blank, and brought in the name of a person who had no interest in the note, or knowledge of the commencement of the action, or of the existence of the note ; but it was held that upon his subsequently authorizing the suit, it might be maintained, there being no evidence of fraud, oppression, or any corrupt or improper motive. See Beckman *v.* Wilson, 9 Met. 434 ; Boardman *v.* Roger, 17 Vt. 589. Where a promissory note payable to order is indorsed in blank, the holder may fill it up with any name he pleases, and sue it in such name. Lovell *v.* Evertson, 11 Johns. 52. In Ogilby *v.* Wallace, 2 Hall, 553, the action was upon a note payable to order and indorsed in blank. At the trial, the plaintiff upon record appearing to be a fictitious person, the judge nonsuited him. It was held that the nonsuit should be set aside, that the questions of fact connected with the possession and prosecution of the note might be submitted to a jury. "The proof," said *Oakley*, J., "that the plaintiff was a fictitious person, may have been very material to show bad faith or fraud in Ash (the holder), in prosecuting the note. That was a question, however, which should have been submitted to the jury. The probability raised by the evidence that the plaintiff was fictitious, could not, properly, have been made the ground of a nonsuit."

(*a*) Per *Eyre*, C. J., in Walwyn *v.* St. Quintin, 1 Bos. & P. 652, 658. "It is every day's practice for a dishonored bill to be thrown back upon the first indorser ; each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser." See also Emerson *v.* Cutts, 12 Mass. 77 ; Ellsworth *v.* Brewer, 11 Pick. 320. But if the bill were really the property of another person, and was put into the hands of a defendant to set off against a claim on him, that might present a different question ; per Lord *Ellenborough*, in Cornforth *v.* Rivett, 2 Maule & S. 512.

(*b*) Death *v.* Serwonters, 1 Lutw. 886 ; Simmonds *v.* Parminter, 1 Wils. 185, 2 Brown, P. C. 43 ; Cowley *v.* Dunlop, 7 T. R. 565 ; Bosanquet *v.* Dudman, 1 Stark. 1 ; per *Shaw*, C. J., in Ellsworth *v.* Brewer, 11 Pick. 316 ; Jordan *v.* Thornton, 2 Eng. Ark. 224 ; Campbell *v.* Humphries, 2 Scam. 478 ; Kyle *v.* Thompson, 2 Scam. 432 ; Bowie *v.* Duvall, 1 Gill & J. 175 ; Merrills *v.* Swift, 18 Conn. 257. See also Martin *v.*

mere possession of the note or bill by such party liable to pay it is *prima facie* evidence that he had paid and taken it up, and he is to be treated as the *bona fide* holder, unless the contrary appear.(*c*) And so the possession of the bill by an accommodation acceptor is *prima facie* evidence of his right to sue.(*d*) But the bail of any parties sued, or any others who pay for parties sued, become thereby holders, but hold as transferees of the party for whom they pay, and not of the party to whom they pay; and they possess the rights of that party, and no others. So if a payee of a note with a mortgage as security indorses the note over, and afterwards pays it himself, this payment does not discharge the mortgage, for he holds it as if it had never passed from him.(*e*)

If an indorser of a note pays the amount of it, and takes it up, it is not necessary for him to prove that notice of its dishonor was given to himself, or that he paid the amount of it under a legal liability, in order to enable him to maintain an action upon it as indorsee against a prior party.(*f*) But if the holder of a bill transferred to him as collateral security for indorsing another

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Warren, 6 Eng. Ark. 285; Emerson *v.* Cutts, 12 Mass. 77; Sater *v.* Hendershott, 1 Morris, Iowa, 118; Coursin *v.* Ledlie, 31 Penn. State, 506; Zebley *v.* Voisin, 7 Barr, 527; Kingman *v.* Hotaling, 25 Wend 423. See Elsam *v.* Denny, 15 C. B. 87, where *Jervis*, C. J. gives the meaning of the word "retire" in reference to bills of exchange. "If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had, had he been called upon in due course, and had paid the amount to his immediate indorsee."

(*c*) M'Gee *v.* Prouty, 9 Met. 547; Page *v.* Lathrop, 20 Misso. 589; Baring *v.* Clark, 19 Pick. 220; Goddard *v.* Cunningham, 6 Iowa, 400; Gordon *v.* Pitt, 3 id. 385, 390; Piequet *v.* Curtis, 1 Sumner, 478; Dugan *v.* United States, 3 Wheat. 172; 2 Pardes., p. 179, art. 349. See also Stephens *v.* McNeill, 26 Barb. 651; Warren *v.* Gilman, 15 Maine, 70; Pilkington *v.* Woods, 10 Ind. 432. It was said also in this case, that the indorsement by the payee is presumptive evidence that it has been in circulation. Bond *v.* Storrs, 13 Conn. 412; Dabbs *v.* Humphries, 10 Bing. 446, 1 Scott, 325; Green *v.* Jackson, 15 Maine, 136. In Louisiana, the early cases held that re possession of the paper after it has been in circulation was not evidence of title unless the indorsement was in blank. Bell *v.* Norwood, 7 La. 95; Barbarin *v* Daniels, id. 479. But the more recent doctrine in that State is, that the indorser may disregard all posterior indorsements, even though special, and avail himself of his possession to sue. Alcock *v.* McKain, 12 La. Ann. 614.

(*d*) Hunter *v.* Kibbe, 5 McLean, 279.

(*e*) Page *v.* Green, 6 Conn. 338.

(*f*) Ellsworth *v.* Brewer, 11 Pick. 316.

bill, pays this last bill without due notice of its dishonor, such payment is gratuitous, and he cannot recover upon the bill pledged to him as collateral security.(*g*)

SECTION II.

AGAINST WHOM THE ACTION MAY BE BROUGHT.

In general, the action may be brought against all the parties liable; for the holder is not obliged to select a party, but may bring suits concurrently against all.(*h*) And it is provided by statute in several States that all or any of the parties liable on bills and notes may be joined in the same action.(*i*) And the failure of the plaintiff in a suit against the maker and indorser jointly, to make out his case against one of the parties jointly, does not, it seems, defeat his suit as to the others.(*j*) It follows, however, that he can have payment but from one, and therefore a payment or any substantial satisfaction, which is not a mere technical defence, by any one of the defendants, will discharge all the actions.(*k*) He may, however, recover the costs in the

(*g*) Bachellor *v.* Priest, 12 Pick. 399.

(*h*) Bishop *v.* Hayward, 4 T. R. 470; Britten *v.* Webb, 2 B. & C. 483; Walker *v.* Walker, 2 Eng. Ark. 542.

(*i*) As in Massachusetts, Gen. Stats. 1860, ch. 129, § 4, p. 654; Ohio, R. S. 1854, p. 630; Rhode Island, R. S. 1857, p. 278; Kentucky, R. S. 1852, ch. 22, § 13; Indiana, 1 R. S. p. 379, § 16; Marshall *v.* Pyeatt, 13 Ind. 255; Mix *v.* State Bank, id. 521; California, Wood's Dig. of Stats., 1858, p. 72, art. 181; Iowa Code, 1857, p. 246; New Jersey, Nixon's Dig. p. 687; Michigan, Comp. Stats. 1857, vol. 2, p. 1148; Tennessee, Code, 1858, p. 399, ch. 15, § 1957; Arkansas, Dig. of Stats. 1858, ch. 15, §§ 9, 10; New York, 2 R. S., 4th ed., p. 500, Code, § 120.

(*j*) Nevill *v.* Hancock, 15 Ark. 511. See Holland *v.* Harris, 2 Sneed, 68. In Mississippi, it is obligatory upon the plaintiff to sue all the parties to bills and notes who live in the State, though separate suits may be brought against the representatives of such parties as have died, or they may be joined with those who are living. Code, 1857, p. 357. But it is held that this statute does not require the drawer of a bill of exchange who lives in the State to be sued jointly with the acceptor. McGrath *v.* Hoopes, 26 Missis 496. And if service of process cannot be had upon the maker of the note sued on, although living within the jurisdiction of the State, the suit may be discontinued as to him, and may proceed against the indorser. Smith *v.* Crutcher, 27 Missis. 455. Upon the death of one of the joint defendants during the pendency of the action, the suit may be revived against his representatives, and continued jointly with the other defendant. Id.

(*k*) Windham *v.* Wither, 1 Stra. 515; Claxton *v.* Swift, 2 Show. 441, 494, 1 Lutw. 878;

other actions also,(*l*) at least to the time of payment, and perhaps any other payment that he was legally obliged to make to recover these. The practice on this point is not quite settled, however.

When several suits are brought, any party liable other than the acceptor may have proceedings stayed in the suit against him on payment of the principal sum due, and costs in that suit only; (*m*) but it seems that where the application comes from the acceptor, who is the original defaulter, he must pay the costs of the other actions also.(*n*)

But indorsers who have paid costs of actions against them cannot recover therefor against the acceptor,(*o*) or any other party. An acceptor, however, for the accommodation of the drawer or other party, has a claim against such party for the costs he has sustained in an action brought against him on the bill; (*p*) but this is otherwise where the accommodation acceptor had evidently no defence to the action.(*q*)

The holder need not sue all parties at once,(*r*) but may sue one or more, and then others as he sees fit, at any time before satisfaction. And mere delay by the holder to sue an acceptor

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Burgess *v.* Merrill, 4 Taunt. 468; Ex parte Wyldman, 2 Ves. Sr. 113; Farwell *v.* Hilliard, 3 N. H. 318. In Windham *v.* Wither, *supra*, the plaintiff having obtained judgment against the drawer and indorser of a note, the principal in one and the costs in both cases were offered him, which he refused, and the court granted a rule to restrain him from taking out execution, and intimated that they would have punished him had he taken out the execution upon both judgments.

(*l*) Toms *v.* Powell, 7 East, 536; Randall *v.* Moon, 12 C. B. 261; Godard *v.* Benjamin, 3 Camp. 33; Tarin *v.* Morris, 2 Dallas, 115; Austin *v.* Bemiss, 8 Johns. 356; Holland *v.* Jourdine, Holt, N. P. 6. It was held otherwise in Gilmore *v.* Carr, 2 Mass. 171, but this case was substantially overruled in Porter *v.* Ingraham, 10 id. 88. The decision in Farwell *v.* Hilliard, 3 N. H. 318, was similar to that in Gilmore *v.* Carr, *supra*. It is provided by statute in Ohio, that costs shall be recovered in one only of the actions when several are brought against the parties liable. R. S. 1854, p. 695. So in Pennsylvania the attorney and counsel fee taxable at law can be recovered in one only of such suits. Purdon's Dig. 1857, p. 91, § 3. In California the plaintiff can recover costs in only one suit at his election, but may recover his disbursements in each action. Wood's Dig., p. 229.

(*m*) Smith *v.* Woodcock, 4 T. R. 691. And see Windham *v.* Wither, 1 Stra. 515; Golding *v.* Grace, 2 W. Bl. 749; Lewis *v.* Dalrymple, 3 Dowl. P. C. 433.

(*n*) See cases cited in preceding note.

(*o*) Dawson *v.* Morgan, 9 B. & C. 618.

(*p*) Jones *v.* Brooke, 4 Taunt. 464; Stratton *v.* Mathews, 3 Exch. 48; Garrard *v.* Cottrell, 10 Q. B. 679; Baker *v.* Martin, 3 Barb. 634.

(*q*) Beech *v.* Jones, 5 C. B. 696; Roach *v.* Thompson, Moody & M. 497.

(*r*) Ruddell *v.* Walker, 2 Eng. Ark. 457.

or maker, though requested by an indorser, does not impair his claim on the indorser.(*s*) Nor does the delay of a second indorser to take up a note impair his claim against the first indorser.(*t*)

If an indorsee indorse a note back again to an indorser, this indorsee who is now indorser may sue his indorsee who has become his indorser, provided he can show that his own indorsement was for want of consideration or any reason not such as gave his indorsee any claim against him ; (*u*) otherwise, as soon as he recovered, the defendant would turn round and sue the plaintiff as indorser.(*v*)

Where a person indorsed a bill at the request of the payee, and thus assumed an obligation similar to that of acceptor, and the paper was protested for non-payment, this indorser was held liable upon the bill at the suit of the drawer.(*w*)

An indorser who proves that the holder and plaintiff is in fact only an agent of a prior indorser, to whom he, the defendant, may look, defeats the action.(*x*)

It has been held that the same person may be sued on the same bill in two actions, if he is a party to it in two capacities ; for example, as joint drawer with others, and as acceptor.(*y*) But it is obvious that only peculiar circumstances could make such a multiplicity of actions proper.

An acceptor of a bill is often said to be as the maker of a

(*s*) Trimble *v.* Thorne, 16 Johns. 152 ; Powell *v.* Waters, 17 id. 176 ; Sterling *v.* Marietta &c. Trading Co., 11 S. & R. 179. In Georgia indorsers are not entitled to notice of demand of the makers, but are taken and held as security till the payment or discharge of the note or other instrument, and are liable to be sued thereon in the same manner and at the same time with the principal or maker. This provision, however, does not extend to notes given for the purpose of negotiation at any chartered bank, as there deposited for collection ; and indorsers may define their liability in the indorsement. But any security or indorser may, whenever he thinks proper after the note or instrument becomes due, require the holder to proceed to collect the same ; and if he should not proceed to do so within three months, the indorser or security shall be no longer liable. Cobb's New Dig. 1851, Vol. I. p. 594.

(*t*) Stafford *v.* Yates, 18 Johns. 327.

(*u*) Per Lord *Kenyon*, in Bishop *v.* Hayward, 4 T. R. 470 ; Wilders *v.* Stevens, 15 M. & W. 208 ; Smith *v.* Marsack, 6 C. B. 486 ; Morris *v.* Walker, 15 Q. B. 589.

(*v*) Bishop *v.* Hayward, 4 T. R. 470 ; Mainwaring *v.* Newman, 2 B. & P. 120 Britten *v.* Webb, 2 B. & C. 483.

(*w*) Shelmerdine *v.* Duffy, 16 Mart. La. 34.

(*x*) Herrick *v.* Carman, 10 Johns. 224, 12 id. 159.

(*y*) Wise *v.* Prowse, 9 Price, 393. The court said that the demands against him in both these characters could not properly be comprised in the same declaration.

note, and the drawer as an indorser; there is, however, this difference. A maker cannot sue an indorser, but an acceptor of a bill can sue the drawer; not, however, on the bill itself, but in the proper form for money paid for him; (*z*) or he may charge it in account with him. And an acceptor for the accommodation of the drawer may, after payment, maintain an action on the bill against the drawer.(*a*)

Indeed, the bill or draft often ends with the words, "and charge the same to my account." If, however, the drawer expressly says, "charge the amount to" some third person, and the drawee accepts, he cannot now charge the amount in any form to the drawer, unless he can show that this third person was the mere agent of the drawer.(*b*)

If A signs a note by the name of B, without B's authority, it is said that he may be sued by the name of A, and alleged to have signed the note by the name of B. This must depend, in many cases, upon the principles of agency. For if A signs as the agent and attorney of B, without authority, he may be liable in the proper action for pretending to have authority which he had not, or for the liability which he thereby incurs. But not, we think, on the note. This no one has signed; neither the principal, because A was not his agent; nor A, for he only put B's name to it. The note, therefore, as such, we should say was simply null.(*c*)

SECTION III.

WHEN THE ACTION MAY BE BROUGHT.

On this point the rule may not be positively determined by authority; but there is strong reason for holding that a party bound to pay has the whole of the day of maturity; and that,

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(*z*) Bell *v.* Norwood, 7 La. 95.

(*a*) Hunter *v.* Kibbe, 5 McLean, 279. In Bachus *v.* Richmond, 5 Yerg. 109, it was held that the acceptor for the accommodation of the drawer might maintain an action on the bill, against the drawer, if he pay the same, the drawer not having funds in his hands. And although he has not paid the bill, if he has done something equivalent to payment, he may sue the drawer; as if he is in confinement under a *ca. sa.* at the suit of the holder. Per *Washington*, J., in Parker *v.* United States, Pet. C. C. 262.

(*b*) Bell *v.* Davidson, 3 Wash. C. C. 328.

(*c*) See Wilson *v.* Barthrop, 2 M. & W. 863.

without demand and refusal, an action cannot be maintained unless it is brought after sunset, or perhaps after business hours, on that day.(*d*) We are, however, of opinion, that, after demand and refusal on that day, an action may be at once maintained; (*e*) for he has declared that he will not pay, and can want further delay only to arrange the means of avoiding payment. But without such prior demand and refusal, an action commenced on the day of maturity is premature, unless the note

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(*d*) Osborn *v.* Moncure, 3 Wend. 170. In this case, which was an action by the payee against the maker of a note, demand was made on the last day of grace, and payment being refused, a suit was commenced at three o'clock on the same day. The court were of opinion that a demand on the maker should be made on the third day of grace, and on a refusal the holder might treat the bill as dishonored, so far as immediately to give notice to the indorser; yet that the maker has the whole day to pay it in, if he thinks proper to seek the holder. They rely upon the general rule applicable to the case of other debts, that the debtor has to the last instant of the day to make payment, and they consider that in this respect there is no distinction in case of negotiable bills and notes See also Taylor *v.* Jacoby, 2 Barr, 495. In Walter *v.* Kirk, 14 Ill. 55, it was said that the maker has the whole of the day of maturity to make payment, and that an action cannot be brought on the note until the day after it becomes due.

(*e*) Wilson *v.* Williman, 1 Nott & McC. 440; McKenzie *v.* Durant, 9 Rich. 61; Dennie *v.* Walker, 7 N. H. 199. In Greeley *v.* Thurston, 4 Greenl. 479, the court say: "Upon consideration, we adopt the views of Mr. Justice *Buller;* and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour, on the day they fall due; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser or drawer also, after notice given, or duly forwarded." The views of *Buller,* J., above referred to, were given in the case of Leftley *v.* Mills, 4 T. R. 170, though the decision was not directly upon the point under consideration. Lord *Kenyon,* C. J., in giving his opinion in the case, had said that the acceptor of a bill had the whole day of maturity in which to make payment, the same as a party to any other contract. See, however, the opinion of *Buller,* J. *Grose,* J. declined giving opinion on this point, as unnecessary to the decision of the case. See Staples *v.* Franklin Bank, 1 Met. 43, where this question was considered at length, and the cases reviewed by *Shaw,* C. J. It has been several times decided that an action lies against the indorser after demand and notice sent on the day of maturity. See note, *infra;* and as the indorser is only provisionally liable on the default of the maker, *a fortiori,* would the action lie against the maker, who is the principal? See further, Farmers' Bank *v.* Duvall, 7 Gill & J. 78, 89; Church *v.* Clark, 21 Pick. 310; Veazie Bank *v.* Paulk, 40 Maine, 109. In Ammidown *v.* Woodman, 31 Maine, 580, where a demand was made upon a note at three o'clock in the afternoon of the last day of grace in a town where there was no bank, and the maker replied that he would never pay it, it was held that a suit commenced thereon immediately was not premature. *Howard,* J. said: "If no demand had been made, he was entitled to the whole day; if hastened by a demand made upon that day, he was still entitled to a convenient length of time. In this case, the defendant was allowed that time. That was all that the law gave him."

is payable at a bank, when it seems that suit may be commenced after bank or business hours.(*f*)

After the demand and refusal, and the depositing in the post-office of notice thereof to an indorser, it seems that in the United States an action may be commenced on that day against the indorser, although the notice will not reach him until the next.(*g*) In all such cases, however, the plaintiff must prove that the demand was made and notice sent before the suit was brought, as the notice does not show this for itself, and the court will not presume it.(*h*) The rule may be different in England.(*i*)

If the action against the indorser is brought before notice is given him or sent to him, it cannot be maintained, although notice is given to him afterwards, and this notice is properly given and reaches him in due season.(*j*)

And it is held, that, if such an action be prosecuted to judgment, this judgment is no bar to an action brought by the same party against the same party, after due notice was given.(*k*)

The acceptor of a bill for the accommodation of the drawer may pay it on the last day of grace, before the commencement of business hours, and forthwith bring his action against the drawer to recover an indemnity.(*l*)

(*f*) Veazie Bank *v.* Winn, 40 Maine, 62; Greeley *v.* Thurston, 4 Greenl. 479. But an action may be maintained upon a note against the maker, where the writ is made after sunset on the last day of grace, and is delivered to an officer on the next day, although there is no demand of payment before the writ is made. Butler *v.* Kimball, 5 Met. 94.

(*g*) Shed *v.* Brett, 1 Pick. 401; Flint *v.* Rogers, 15 Maine, 67; Manchester Bank *v.* Fellows, 8 Foster, 302, per *Eastman*, J. And so City Bank *v.* Cutter, 3 Pick. 414, per *Parker*, C. J. *Contra*, Smith *v.* Bank of Washington, 5 S. & R. 318.

(*h*) Manchester Bank *v.* Fellows, 8 Foster, 302.

(*i*) Castrique *v.* Bernabo, 6 Q. B. 498. In this case an action was commenced against the indorser of a bill on the day on which the letter containing notice of dishonor to him was put into the post, and it appeared that by the routine of the post-office this would reach the defendant between four and five in the afternoon of that day; and it also appeared that the offices of the court were open only till five in the afternoon of the day in question. It was held that the action could not be maintained.

(*j*) New England Bank *v.* Lewis, 2 Pick. 125. In a previous case, Stanton *v.* Blossom, 14 Mass. 116, it was not considered as an objection to the action, that it was commenced before the notice was put into the post-office; but the case did not turn on that point.

(*k*) New England Bank *v.* Lewis, 8 Pick. 113, per *Wilde*, J.

(*l*) Whitwell *v.* Brigham, 19 Pick. 117, per *Morton*, J.

An action may be brought at once against a drawer after non-acceptance, and due demand, protest, and notice, without waiting for the maturity of the bill; (*m*) and so against an indorser as well.(*n*)

If a note be payable by instalments, or if the interest be payable periodically, an action may of course be brought for any instalment, or any interest, as it becomes due.(*o*)

(*m*) Milford *v.* Mayor, 1 Doug. 55, per *Buller*, J. See also Bright *v.* Purrier, Bull. N. P. 269; Robinson *v.* Ames, 20 Johns. 146; Winthrop *v.* Pepoon, 1 Bay, 468; Weldon *v.* Buck, 4 Johns. 144; Miller *v.* Hackley, 5 id. 375; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Morgan *v.* Towles, 8 Mart. La. 730; Sterry *v.* Robinson, 1 Day, 11.

(*n*) Ballingalls *v.* Gloster, 3 East, 481. In this case it was urged that an indorser stood in a situation different from that of a drawer; and that, although a drawer might be sued immediately on non-acceptance, an indorser could not until the expiration of the time limited for the payment of the bill; but the court was clear that the case of an indorser was not distinguishable from that of a drawer, and that every indorser was a new drawer. And so Watson *v.* Loring, 3 Mass. 557. Lenox *v.* Cook, 8 Mass. 460, was an action against the indorser of a bill protested for non-acceptance and non-payment, and it appeared that the indorser had been notified of the non-acceptance, but not of the non-payment. The defendant's counsel contended that, although a right of action accrued on the non-acceptance, yet that it was merged in the new right of action arising on the protest for non-payment, and that this new right was lost by the neglect of notice. By the court: "When acceptance is refused by the drawee, a right of action accrues to the holder, after due notice. He is not bound to demand payment at the time the bill falls due, nor to protest for non-payment, nor to retain the bill for that purpose; but he may bring his action against all parties liable immediately on the refusal of the drawee to accept."

(*o*) Tucker *v.* Randall, 2 Mass. 283; Greenleaf *v.* Kellogg, id. 568; Cooley *v.* Rose, 3 id. 221.

CHAPTER XIV.

OF EVIDENCE.

THE general laws of evidence are somewhat qualified, and exhibit some peculiarities, in their application to notes and bills; and it is these peculiarities which we shall endeavor to show.

We will consider first the competency of witnesses; and then what things must be proved in an action upon a note or bill, and how they may be proved.

The common and ancient rule, which disqualifies as a witness any person having an interest in the action, wherever it has not been changed or abrogated by statute,(*a*) and is there-

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(*a*) By the statute 3 & 4 Wm. IV., ch. 42, §§ 26 and 27, a party was made a competent witness in cases where the ground of objection was merely, that the verdict or judgment would be evidence for or against him. By indorsing the witness's name on the record, the verdict or judgment could not be so used. But by Lord Denman's Act, 6 & 7 Vict., ch. 85, incapacity from interest is removed in nearly all cases. The common-law rule has been changed in most of the United States. In some of the States all disability arising from interest is removed, and parties to the action, with certain exceptions not important to be noticed here, are admitted as competent witnesses for themselves or any other party. As in Massachusetts, Gen. Stats. 1860, ch. 131, §§ 13, 14. Maine, R. S. 1857, ch. 82, §§ 78–83. New Hampshire, Acts of 1857, ch. 1952, pamph. ed. Laws, p. 1868. Vermont, Acts, 1852, No. 13 (Nov. 23, 1852), Acts, 1853, No. 13 (Dec. 6, 1853). Rhode Island, R. S. 1857, ch. 187, § 34. Connecticut, Comp. 1854, p. 95, § 141. New Jersey, Laws, Session of 1859, p. 489, ch. 166. Wisconsin, R. S. 1858, ch. 137, §§ 50–59. In this State, notice of the examination of a party in his own behalf is to be given to the opposite party, who may then testify without such notice. Mississippi, R. C. 1857, p 510. But in this State it is declared that the deposition of such interested witness shall not be read in evidence. Minnesota, Stats. 1858, p. 681, ch. 84, §§ 51, 52. Ohio, R. S. 1854, ch. 87, §§ 310–315, p. 662. In this State a party must give notice of his intention to testify in his own behalf In New York, interest in the event of the suit disqualifies parties only. R. S., 4th ed., Vol. II. p. 549, §§ 398, 399. So in Oregon; Stats. 1855, p. 13, ch 4, §§ 2, 3. In Missouri, no witness is excluded by reason of his interest in the event of the action, unless a party thereto, or a person for whose immediate benefit the action is prosecuted. Any party may compel the adverse party to testify; and the party thus examined may testify in his own behalf in respect to any matter pertinent to the issue. R. S. 1855, Vol. II. p. 1576, ch. 168. There are similar regulations in Michigan. Comp. Laws, 1847, Vol. II. p. 1184, ch. 127. So in California; Wood's

fore in force as to actions upon contracts generally, applies also to those upon bills or notes. By this rule, a party of record to the action, or one directly interested in the result, and called in support of his interest, or one against whom or for whom a verdict in this action would be evidence in another, is incompetent; (*b*) but one who is interested, if equally interested on both sides, that is, if affected equally by the gaining or the losing of the action, is competent.(*c*) Thus a joint and several maker of a note may be called by the payee to prove the handwriting of the other maker who is defendant; for if plaintiff recovers of defendant, witness would be liable to defendant for contribution.(*d*) So the maker of a note, after judgment has been recovered against him by default, has been held a competent witness for the indorser.(*e*) So it would be in an analogous case as to partners.(*f*)

Upon the same ground, in an action against the principal

Dig. 1858, p. 217, art. 1126, and p. 220, arts. 1151 – 1156. In Alabama, it is provided that no objection shall be taken to the competency of a witness because he is interested in the event of the suit, or liable for costs, unless the verdict and judgment would be evidence for him in another suit. Code, 1852, § 2302.

In several States a party may compel the adverse party to testify as a witness in his behalf. As in Vermont, Acts, 1852, No. 13; Rhode Island, R. S., 1857, c. 187, § 34; New York, R. S., 4th ed., Vol. II. p. 548; Delaware, Acts, 1859, p. 686; Ohio, R. S., 1854, p. 663; Wisconsin, R. S., 1858, p. 809.

(*b*) Bent *v* Baker, 3 T. R. 27; Jordaine *v.* Lashbrooke, 7 id. 601; Smith *v.* Prager, 7 id. 60; Jones *v.* Brooke, 4 Taunt. 464.

(*c*) 1 Greenl. Ev. §§ 391, 399, 420; Phillipps's Ev., 4th Am. ed., Vol. I. p. 91. And see cases cited *infra*, in notes *d*, *e*, *et seq.*

(*d*) York *v.* Blott, 5 Maule & S. 71; Lockart *v.* Graham, 1 Stra. 35; Poole *v.* Palmer, 9 M. & W. 71; Russell *v.* Blake, 2 Scott, N. R. 574, 2 Man. & G. 374; Page *v.* Thomas, 6 M. & W. 733.

(*e*) Vance *v.* Collins, 6 Calif. 435. In an action against several defendants, one who has suffered judgment by default is a competent witness for the plaintiff against the others. Worrall *v.* Jones, 7 Bing. 395; Green *v.* Sutton, 2 Moody & R. 269; Pipe *v.* Steele, 2 Q. B. 733. But a joint maker is not a competent witness for his co-maker in an action against him, to prove illegality of consideration. Slegg *v* Phillips, 4 A. & E. 852.

(*f*) Ridley *v.* Taylor, 13 East, 175. In this case one member of a firm drew a bill in the partnership name, and passed it over to a separate creditor of his, to discharge his own debt, and in an action brought by the separate creditor against the acceptor, it was held that the other partner might have been called as a witness by the defendant to disprove the authority of the debtor partner to give the joint security; for though, if the separate creditor recovered against the acceptor, he would have his remedy over against the firm, yet the innocent partner would have his remedy over against the other. And Lord *Ellenborough*, C. J. observed, that the bankruptcy of the debtor partner in the mean time could make no difference on the question of competency. See Goodacre *v.* Breame, Peake, N. P. 175.

upon a promissory note, his surety is a good witness for either party; and in an action against the surety, the principal may be a witness for the plaintiff, but not for the defendant, even though the Statute of Limitations protects the principal against the suit of the creditor, for he may still be accountable over to the surety.(*g*) Nor, under like circumstances, is one joint promisor a competent witness for his co-promisor; (*h*) or one joint indorser for his co-indorser.(*i*)

In an action against the acceptor of a bill, the drawer is a competent witness for either party; (*j*) unless the acceptance was for his accommodation, when he is not a competent witness for the acceptor to prove usury in the discounting of the bill, without a release; (*k*) and the drawer is not competent to prove that the bill was drawn for his accommodation.(*l*)

If the witness is liable in either result of the case, but liable for less if that side which he is called to support prevails than if the other side succeeds, he is incompetent.(*m*)

(*g*) Odell *v.* Dana, 33 Maine, 182; Chapman *v.* Hiden, 2 Patton & H. 91. And see Townend *v.* Downing, 14 East, 565; Pogue *v.* Joyner, 1 Eng. Ark. 241; Keer *v.* Clark, 11 Humph. 77. And see McGinnes *v.* McGinnes, 23 Ga. 613; Bennett *v.* Dowling, 22 Texas, 660; Atwood *v.* Wright, 29 Ala. 346.

(*h*) Jewett *v.* Davis, 6 N. H. 518; Whipple *v.* Stevens, 19 N. H. 150; Finn *v.* Gustin, 4 E. D. Smith, 382.

(*i*) Finn *v.* Gustin, 4 E. D. Smith, 382.

(*j*) Dickinson *v.* Prentice, 4 Esp. 32; Rich *v.* Topping, Peake, Cas. 224; Humphrey *v.* Moxon, id. 52; Lowber *v.* Shaw, 5 Mason, 241; Storer *v.* Logan, 9 Mass. 55; Crowley *v.* Barry, 4 Gill, 194.

(*k*) Hardwick *v.* Blanchard, Gow, 113; Burgess *v.* Cuttill, 6 Car. & P. 282; Bowne *v.* Hyde, 6 Barb. 392; Jones *v.* Brooke, 4 Taunt. 464.

(*l*) Smith *v.* Thorne, 9 Watts, 144.

(*m*) As in an action against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer is not a competent witness to prove that the holder came by the bill on usurious consideration, because he does not stand indifferently liable to the holder and the acceptor; for the former can recover against him only the contents of the bill, while the latter can recover against him both the amount of the bill, and also all damages he may have sustained, including the costs of the action against himself. Jones *v.* Brooke, 4 Taunt. 464. But where, at the time of the drawing of a bill, there was an open account between the drawer and acceptor, the state of which neither party was acquainted with, and it turned out that the drawer was at the time indebted to the acceptor, it was held that the bill so drawn and accepted could not be treated as an accommodation bill; and therefore, in an action by an indorsee of the bill against the acceptor, the drawer was a competent witness in the cause. Bagnall *v.* Andrews, 7 Bing. 217. See also Bottomley *v.* Wilson, 3 Stark 148; Harman *v.* Lasbrey, Holt, N. P. 399; Stratton *v.* Mathews, 18 Law J. Exch. 5. The drawer is rendered competent by a release. Hardwick *v.* Blanchard, Gow, 113. And so, if he has become bankrupt and obtained his certificate, he is admissible. Ashton *v.* Lodges, Moody & M.

So, where the action is by an indorsee against the drawer or acceptor of a bill or the maker of a note, the indorser is generally a competent witness either for plaintiff or defendant, as he is indifferent in point of interest (*n*)

So he has been permitted to prove payment; (*o*) or a promise to pay the bill made after it had become due; (*p*) the time of negotiation by indorsement; (*q*) a fraudulent alteration of date; (*r*) an indorsee's want of interest; (*s*) or usury; (*t*) and his own indorsement. (*u*)

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127. And see Brind v. Bacon, 5 Taunt. 183. In an action against an accommodation indorser of a note, the maker is an incompetent witness, on the principle stated in Jones v. Brooke, *supra*. Bank of Missouri v. Hull, 7 Misso. 273. And for the same reason a principal is incompetent when called in favor of the surety. McGinnes v. McGinnes, 23 Ga. 613; Bennett v. Dowling, 22 Texas, 660; Riddle v. Moss, 7 Cranch, 306; Richards v. Griffin, 5 Ala. 195.

(*n*) Bayley on Bills, 4th ed. 422; Richardson v. Allan, 2 Stark. 334; Stevens v. Lynch, 2 Camp. 332, 12 East, 38; Birt v. Kershaw, 2 id. 458; Charrington v. Milner, Peake, Cas. 6; Reay v. Packwood, 7 A. & E. 917. See Baskins v. Wilson, 6 Cowen, 471. In Buckland v. Tankard, 5 T. R. 578, it was held that an indorser cannot be called to prove title in himself, as, by proving that he delivered the bill to the plaintiff, as his agent only, to enable him to obtain payment; and that a release from the defendant would not render him a competent witness. The principle of this decision, however, is pronounced very questionable in Phillipps, Ev., 4th Am. ed., p. 199.

(*o*) Charrington v. Milner, Peake, Cas. 6; Humphrey v. Moxon, id. 52; Adams v. Lingard, id. 117; White v. Kibling, 11 Johns. 128; Bryant v. Rinerbush, 2 N. H. 212; Maynard v. Nekervis, 9 Barr, 81; Bourg v. Bringier, 20 Mart. La. 567. In Reay v. Packwood, 7 A. & E. 917, the indorser being examined on the *voir dire*, stated that he had received money from the defendant to pay the bill to the plaintiff. It was urged that he was incompetent on this account; and Lord *Denman*, C. J., interrupting the counsel, said: "It is clear that no agent would be competent to prove that he paid a debt, if this objection could prevail." The court held that he was a competent witness. See also Birt v. Kershaw, 2 East, 458. In Franklin Bank v. Pratt, 31 Maine, 501, it was held that the maker of a note, in an action upon it by an indorsee against the indorser, is not precluded from testifying to the payment of the note by the rule of public policy, which prevents a witness from impeaching the original validity of a note which he has put in circulation. See Thayer v. Crossman, 1 Met. 416; Davis v. Sawtelle, 30 Maine, 369; Smith v. Morgan, 38 id. 468; Warren v. Merry, 3 Mass. 27.

(*p*) Stevens v. Lynch, 2 Camp. 332, 12 East, 38.

(*q*) Spring v. Lovett, 11 Pick. 417; Baker v. Arnold, 1 Caines, 258; Baird v. Cochran, 4 S. & R. 397; Adams v. Carver, 6 Greenl. 390.

(*r*) Parker v. Hanson, 7 Mass. 470; Haines v. Dennett, 11 N. H. 180; Shamburgh v. Commagere, 10 Mart. La. 18.

(*s*) Barker v. Prentiss, 6 Mass. 430; Maynard v. Nekervis, 9 Barr, 81.

(*t*) Tuthill v. Davis, 20 Johns. 285; Tucker v. Wilamowicz, 3 Eng. Ark. 157. Whether a party to a bill or note may be allowed to prove it originally void, for usury or other cause, is a question upon which the courts are much divided; and the cases are cited *infra*, note z, *et seq.*

(*u*) Richardson v. Allan, 2 Stark. 334. For, though recovery by the plaintiff will dis-

It is, however, held, on a nice distinction, that an indorser cannot prove notice of non-acceptance, where an indorsee after him sues an indorser before him.(*v*) He has, however, in a similar case, been called for the defendant.(*w*)

Whether, upon general grounds of public policy, an indorser of a negotiable security indorsed before it was due, or other party to it, is admissible as a witness to impeach its original validity, is a question upon which the courts have been much divided in opinion. Against the admissibility of such a witness, it is said that it is important to secure the currency and circulation of negotiable securities, and that a party who has given them credit by his signature should not afterwards be allowed to invalidate them by his testimony. This was the rule laid down by Lord Mansfield, in the leading case of Walton *v.* Shelley,(*x*) and it is the rule adopted in the Supreme Court of the United States,(*y*) and in several of the State courts.(*z*) But in England

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charge him from his liability to the plaintiff, yet "the indorser, by proving the handwriting to be his own, would charge himself"; and if the plaintiff resorts to him, he will have his remedy against the acceptor. Willsheir *v.* Cox, Guildhall, 25th May, 1826, *coram Abbott*, C. J., Chitty on Bills, 673.

(*v*) Talbot *v.* Clark, 8 Pick. 51; Bayley on Bills, 2d Am. ed. 595; Cropper *v.* Nelson, 3 Wash. C. C. 125.

(*w*) Chitty on Bills, p. 674; Hall *v.* Hale, 8 Conn. 336.

(*x*) 1 T. R. 296. In this case the indorser of a promissory note was called to prove it void for usury. Lord *Mansfield*, C. J. declared the rule of law founded upon public policy to be this: "That no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." The rule of Walton *v.* Shelley was adhered to in Hart *v.* M'Intosh, 1 Esp. 298. When it was suggested that the Court of King's Bench had adopted a contrary rule, *Buller*, J. asked, "Had the rule so laid down in the King's Bench ever been adopted in the Common Pleas?" It was said it had not; and Le Blanc, Sergeant, said that Eyre, C. J. had been of opinion that the testimony of a witness under such circumstances was inadmissible. *Buller*, J. then said that the rule of evidence had been so laid down by Lord Mansfield, and been so decided by the court, and that he would adhere to it; and he accordingly rejected the evidence of the indorser. For the cases overruling these, see *infra*.

(*y*) Bank of the United States *v.* Dunn, 6 Pet. 51, 57; Bank of the Metropolis *v.* Jones, 8 Pet. 12; United States *v.* Leffler, 11 Pet. 86, 94, 95; Scott *v.* Lloyd, 12 Pet. 145; Henderson *v.* Anderson, 3 How. 73; Saltmarsh *v.* Tuthill, 13 How. 229; Taylor *v.* Luther, 2 Sumner, 235, per *Story*, J.

(*z*) In Massachusetts, Churchill *v.* Suter, 4 Mass. 156; Fox *v.* Whitney, 16 Mass. 118. This last case holds that the rule does not apply between original parties, but

this doctrine has been overruled, and the indorser or other party held competent to prove any fact to which any other witness would be competent to testify; (*a*) and the doctrine held by the courts of some of the American States is the same with that which now prevails in England.(*b*)

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only to a case where the paper has been put in circulation by indorsement. And see Barker *v.* Prentiss, 6 Mass. 430; Packard *v.* Richardson, 17 Mass. 122. In Thayer *v.* Crossman, 1 Met. 416, the decisions are reviewed, and the rule vindicated, by *Shaw*, C. J.; but it was held that the rule did not apply in the case of negotiable securities indorsed when overdue or dishonored. See also Van Schaack *v.* Stafford, 12 Pick. 565; Bubier *v.* Pulsifer, 4 Gray, 592. In Maine, Deering *v* Sawtel, 4 Greenl. 191; Chandler *v.* Morton, 5 Greenl. 374; Clapp *v.* Hanson, 15 Maine, 345; Franklin Bank *v.* Pratt, 31 Maine, 501. The rule was again under the consideration of the court in the recent case of Lincoln *v.* Fitch, 42 Maine, 456, and was again confirmed. In Pennsylvania, O'Brien *v.* Davis, 6 Watts, 498; Harrisburg Bank *v.* Forster, 8 Watts, 304, 309; Davenport *v.* Freeman, 3 Watts & S. 557; Harding *v.* Mott, 20 Penn. State, 469; Pennypacker *v.* Umberger, 22 Penn. State, 492; Gaul *v.* Willis, 26 Penn. State, 259, 261. In Ohio, Treon *v.* Brown, 14 Ohio, 482; Bodkins *v.* Taylor, 14 Ohio, 489; Stone *v.* Vance, 6 Ohio, 246; Rohrer *v.* Morningstar, 18 Ohio, 579. Illinois, Webster *v.* Vickers, 2 Scam. 295. Iowa, Strang *v.* Wilson, 1 Morris, 84. In Mississippi, Drake *v.* Henly, Walker, 541. In Tennessee, Smithwick *v.* Anderson, 2 Swan, 573. This case recognizes the rule contrary to the authority of the early case of Stump *v.* Napier, 2 Yerg. 35. In Louisiana, the rule was stated and conceded by *Porter*, J., in Shamburgh *v.* Commagere, 10 Mart. La. 139, and was again stated, but an opinion withheld, by *Martin*, J., in Cox *v.* Williams, 17 Mart. La. 18.

(*a*) Jordaine *v.* Lashbrooke, 7 T. R. 601. This was an action by the indorsee of a bill of exchange against the acceptor. The bill bore date at Hamburg; and the defence was, that it was drawn in London, and so was void at its creation, for want of a stamp. The indorser was called to prove this fact, and the court held that he was admissible. Lord *Kenyon* in this case referred to the expression imputed to him in Bent *v.* Baker, 3 T. R. 27, 34, that a person who has put his name on a negotiable instrument shall never be allowed by his testimony to invalidate it, and remarked, that, "having frequently weighed this subject in my mind, and having not only entertained a contrary opinion, but having also always acted upon that opinion at Nisi Prius, I think I never could have used the expression imputed to me." In Rich *v.* Topping, 1 Esp. 176, the same learned judge made similar remarks. See also Brard *v.* Ackerman, 5 Esp. 119.

(*b*) The rule of exclusion is rejected in New York. Stafford *v.* Rice, 5 Cowen, 23; Bank of Utica *v.* Hillard, 5 Cowen, 153; Williams *v.* Walbridge, 3 Wend 415. These cases overthrew the decision of Winton *v.* Saidler, 3 Johns. Cas. 185, which followed the authority of Walton *v.* Shelley, 1 T. R. 296, in opposition to the opinions of *Kent* and *Radcliffe*, Justices, the former of whom ably reviews the English cases on the subject. In New Jersey, Freeman *v.* Brittin, 2 Harrison, 191. In Maryland, Ringgold *v.* Tyson, 3 Harris & J. 172; Hunt *v.* Edwards, 4 id. 283. In Virginia, Taylor *v.* Beck, 3 Rand. 316. In Vermont, the rule was rejected in Nichols *v.* Holgate, 2 Aikens, 138. This decision was disapproved in Chandler *v.* Mason, 2 Vt. 193. But in a later case, the question coming directly before the court, the decision in Nichols *v.* Holgate was confirmed. Pecker *v.* Sawyer, 24 Vt. 459. The rule is also rejected in Connecticut. Townsend *v.*

The rule excluding this testimony, where adopted at the present day, is generally limited and modified so as to apply only to negotiable securities indorsed and put into circulation in the usual course of business before maturity or dishonor; (*c*) and so as not to apply between original parties or their representatives and agents, for these stand affected with notice of the taint of illegality; (*d*) nor does it apply when the indorser or other party is called to prove a fact not going to the original infirmity of the security, as payment or fraudulent alteration; (*e*) nor to paper indorsed without recourse.(*f*)

The cases under this rule mostly arise upon securities declared void by statute, as those given upon a gaming or usurious consideration, inasmuch as such defence may be taken advantage of in a suit by an innocent indorsee.(*g*)

In Pennsylvania, a rule of law has been established, that one who transfers a chose in action cannot support by his testimony the rights of the transferee to recover it; and accordingly, whether a party to negotiable paper transfer it by delivery, indorsement, or assignment, he is alike incompetent to be a

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Bush, 1 Conn. 260; Jackson *v.* Packer, 13 Conn. 342. In New Hampshire, the rule of Walton *v.* Shelley was at first adopted. Bryant *v.* Ritterbush, 2 N. H. 212; Hadduck *v.* Wilmarth, 5 N. H. 181. But more recently it has been denied. Marston *v.* Brackett, 9 N. H. 349; Odiorne *v.* Howard, 10 N. H. 343; Haines *v.* Dennett, 11 N. H. 180. In Michigan, the rule is rejected in Orr *v.* Lacey, 2 Doug. Mich. 230, where the question is reviewed at great length by *Whipple*, J. In Kentucky, Gorham *v.* Carroll, 3 Littell, 221. In this case the indorser indorsed the note without recourse to him, and therefore marked it with suspicion, so that the general rule was not considered. In North Carolina, Guy *v.* Hull, 3 Murph. 150. In South Carolina, Knight *v.* Packard, 3 McCord, 71. In Georgia, Slack *v.* Moss, Dudley, 161. In Alabama, Todd *v.* Stafford, 1 Stew. 199; Griffing *v.* Harris, 9 Port. Ala. 225. In Texas, Parsons *v.* Phipps, 4 Texas, 341. In Missouri, Bank of Missouri *v.* Hull, 7 Misso. 273; St. John *v.* McConnell, 19 Misso. 38.

(*c*) Baird *v.* Cochran, 4 S. & R. 397; Parke *v.* Smith, 4 Watts & S. 287; Thayer *v.* Crossman, 1 Met. 416; Smithwick *v.* Anderson, 2 Swan, 573.

(*d*) Fox *v.* Whitney, 16 Mass. 118; Van Schaack *v.* Stafford, 12 Pick. 565; Bubier *v.* Pulsifer, 4 Gray, 592.

(*e*) Work *v.* Kase, 34 Penn. State, 138; Buck *v.* Appleton, 14 Maine, 284; Wendell *v.* George, R. M. Charlt. 51; Franklin Bank *v.* Pratt, 31 Maine, 501; White *v.* Kibling, 11 Johns. 128; Tuthill *v.* Davis, 20 id. 285; Powell *v.* Waters, 17 id. 176; M'Fadden *v.* Maxwell, 17 id. 188; Maynard *v.* Nekervis, 9 Barr, 81; Zeigler *v.* Gray, 12 S. & R. 42; Shamburgh *v.* Commagere, 10 Mart. La. 18.

(*f*) Abbott *v.* Mitchell, 18 Maine, 354; Gorham *v.* Carroll, 3 Littell, 221; Davis *v.* Sawtelle, 30 Maine, 389; Parker *v.* Hanson, 7 Mass. 470; Barker *v.* Prentiss, 6 Mass. 430.

(*g*) Per *Shaw*, C. J., in Thayer *v.* Crossman, 1 Met. 416.

witness for a subsequent holder, although released from all liability.(*h*) And such a rule has been adopted by statute in some of the States.(*i*)

Even where the ancient rule is in full force, a payee who has indorsed a note may be called to prove any facts subsequent to the making of the note which affect the right of an indorsee to recover from the maker.(*j*) And, in general, the being a party to the bill or note is no incompetency. It must be shown that the witness has a direct interest, not counterpoised by an adverse interest, and is called to support it.(*k*) When an indorsee sues the maker, the declarations of the payee, made when the note was made, are admissible as of the *res gestæ*.(*l*) When the declarations of a former holder against his own title are offered to disprove the title of a plaintiff, their admissibility must depend upon the question whether the plaintiff stands upon the title of that former holder and only on that, for we have seen repeatedly that a present holder may have a very good claim where a former holder, and even his transferrer, has none at all; as when a thief or finder transfers for value a note negotiable by delivery to an innocent purchaser. If, therefore, the former holder's title is not necessary to the validity of the present holder, his declarations impeaching it are not admissible.(*m*)

(*h*) Bailey *v.* Knapp, 19 Penn. State, 192; Hatz *v.* Snyder, 26 Penn. State, 511.

(*i*) Code of Ala. 1852, 2290; Hudson *v.* Weir, 29 Ala. 294. See Watson *v.* Bailey, 2 Duer, 509.

(*j*) Shuttleworth *v.* Stephens, 1 Camp. 407. And see cases cited *supra*, note *e*, and also Powell *v.* Waters, 17 Johns. 176; M'Fadden *v.* Maxwell, 17 Johns. 188.

(*k*) Bent *v.* Baker, 3 T. R. 27; Jordaine *v.* Lashbrooke, 7 id. 601; Smith *v.* Prager, 7 T. R. 60; Jones *v.* Brooke, 4 Taunt. 464; Tomlinson *v.* Spencer, 5 Calif 291; Holland *v.* Chambers, 22 Ga. 193; Parsons *v.* Phipps, 4 Texas, 341. A possible liability to damages in a suit will not exclude a witness, as this would create, at most, a too remote and contingent interest. Barney *v.* Newcomb, 9 Cush. 46, 57. See Buckland *v.* Tankard, 5 T. R. 578; Williams *v.* Banks, 11 Md. 198; Soule *v.* Dawes, 6 Calif. 473.

(*l*) Kent *v.* Lowen, 1 Camp. 177. And see Langdon *v.* Hulls, 5 Esp. 156; Lewis *v.* Gray, 1 Mass. 297. The competency of such proof as part of the *res gestæ* is denied in Bailey *v.* Wakeman, 2 Denio, 220, overruling the same case in 2 Hill, 279. In Hedger *v.* Horton, 3 Car. & P. 179, *Gazelee*, J. refused to receive evidence of what a prior holder had said against the validity of a bill whilst he was the holder, because such holder was living and might be called as a witness.

(*m*) Barough *v.* White, 4 B. & C. 325. See observations of *Parke*, J. on this case, in Woolway *v* Rowe, 1 A. & E. 114, 116. In an action by the indorsee against the maker of a note, it was held, in Beauchamp *v.* Parry, 1 B. & Ad. 89, that declarations

In general, the essential things which must be proved in any action upon a note or bill are the existence, genuineness, and identity of the indorsement, the signature and identity of the defendant, and of those through whom the plaintiff claims, and of the plaintiff himself; the right and interest of the plaintiff, which sometimes involves the question of consideration, and always the performance of any conditions on which the liability

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of the payee (not uttered at the time of making the note) are not admissible to prove illegal consideration, unless it be previously shown that the indorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration. And so where the drawer of a bill indorses it before due to a third person as a valid security, his declaration afterwards that it was an accommodation bill will not defeat the indorsee's right to sue the acceptor. Shaw *v.* Broom, 4 Dowl. & R. 730. But if the drawer had made such declaration while he was holder of the bill, and had not parted with it until after it was due, then "whatever consideration the plaintiff might have given for such a bill, still, by law, he could not be in a better situation than the drawer, and must stand or fall by the title of the latter." Per *Abbott*, C. J., in Shaw *v.* Broom, *supra*, commenting upon Benson *v.* Marshal, there cited. In Phillips *v.* Cole, 10 A. & E. 106, which was an action by an indorser of a note against the maker, the declarations of one Alves, a prior indorser, made while he was holder of the note, were offered to prove fraud. But no evidence was offered which connected the plaintiff with Alves. The declarations were therefore inadmissible on this ground. See also Pocock *v.* Billing, 2 Bing. 269; Smith *v.* De Wruitz, Ryan & M. 212; Graves *v.* Key, 3 B. & Ad. 313; Duckham *v.* Wallis, 5 Esp. 251. In like manner the American cases hold that the declarations of a former holder, while such, are admissible if made before the paper was due, and otherwise not. Fitch *v.* Chapman, 10 Conn. 8; Jackson *v.* Bard, 4 Johns. 230; Weidman *v.* Kohr, 4 S. & R. 174; Snelgrove *v.* Martin, 2 McCord, 241; Whitaker *v.* Brown, 8 Wend. 490; Hatch *v.* Dennis, 10 Maine, 244; Blount *v.* Riley, 3 Ind. 471; Abbott *v.* Muir, 5 Ind. 444; Land *v.* Lee, 2 Rich. 168; Sharp *v.* Smith, 7 id. 3. In Paige *v.* Cagwin, 7 Hill, 361, the cases are reviewed at length, and the decision seems counter to the general tenor of the authorities, if the case is correctly stated by the reporter. See note to this case, p. 384 of the report. This decision is relied upon in Smith *v.* Schanck, 18 Barb. 344. In Indiana, under the statute (R. S. 1843, p. 577, § 8) allowing the same defences against a note assigned before as one assigned after maturity, it is held that the declarations of the former holder are admissible whether he assigned the paper before or after it was due. Stoner *v.* Ellis, 6 Ind. 152. See also Curtiss *v.* Martin, 20 Ill. 557. So in Bond *v.* Fitzpatrick, 4 Gray, 89, it was held that the declarations of a prior holder, made while he held the note, are admissible in evidence, as against one who took the note when overdue, to show payment to such prior holder, or any right of set-off which the maker had against him. And also Reed *v.* Vancleve, 3 Dutch. 352. If the instrument be not negotiable, then the declarations of the payee made previous to the assignment, are admissible in an action brought in the name of the payee; because he was then admitting against his own interest, and, being a party to the record, the defendant cannot make use of him as a witness. Hatch *v.* Dennis, 10 Maine, 244; Hacket *v.* Martin, 8 Greenl. 77; Abbott *v.* Muir, 5 Ind. 444. The declarations of the payee, made after parting with his interest in the note, are clearly not admissible in evidence. Camp *v.* Walker, 5 Watts, 482. And see Washburn *v.* Ramsdell, 17 Vt. 299.

of the defendant may rest, as acceptance, or non-acceptance, protest, demand, or notice.

The existence of the instrument, as set forth in the declaration, is, *prima facie*, proved by the exhibition of it.(*n*) Where this cannot be done by reason of the loss of the note, peculiar questions arise, which have been already considered. The instrument must conform to the declaration; (*o*) and formerly the law in respect to variance was both important and difficult; but now, almost every variance which does not go to the merits of the action, or is not a surprise upon the defendant, is curable by amendment upon such terms as the court direct.(*p*)

Allegations which are not necessary must sometimes be proved because they are made; but when they are wholly immaterial they need not be proved, as in an action against the drawer or indorser of a bill accepted generally, it seems to be determined that the acceptance need not be alleged, and when it is alleged it need not be proved; (*q*) but it must be alleged and proved if the bill has been accepted, payable at a different place from the address at the foot thereof; and proof of presentment at the place specified in the acceptance be rendered necessary.(*r*) So, in an action against an acceptor, upon a general acceptance,

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(*n*) 2 Greenl. on Evidence, § 156; 2 Stark. on Evidence, 227, 228; Bayley on Bills, 2d Am. ed. 486; Wells *v.* Whitehead, 15 Wend. 527. And see Cunliffe *v.* Whitehead, 3 Dowl. 634; Shearm *v.* Burnard, 10 A. & E. 593; Reed *v.* Gamble, 5 Nev. & M. 433, 10 A. & E. 597, note. The existence of the note must be proved by production, even where there is a statute dispensing with proof of the execution of the instrument, unless the signature be denied under oath. Sebree *v.* Dorr, 9 Wheat. 558; Matossy *v.* Frosh, 9 Texas, 610.

(*o*) For instances illustrating this rule, see Phillipps on Evidence, 4th Am. ed, Vol. III. p. 142; Greenleaf on Evidence, Vol. II. § 160. In Spangler *v.* Pugh, 21 Ill. 85, where a note offered in evidence differed in amount half a cent from the one declared on, it was held to be a variance, and that it could not be received in evidence. "While the variance," said *Walker*, J., "is trifling in amount, it is descriptive of the identity of the instrument, and being so, it is material."

(*p*) In England, as well as in the United States, a very liberal discretion in the amendment of pleadings is conferred upon courts and judges by statute. See Lord Tenterden's Act, 9 Geo. IV. ch. 15; Stats 3 & 4 William IV. ch. 42, 15 & 16 Vict. ch. 76, § 222, and 17 & 18 Vict. ch. 125, § 96. And see New York Code of Procedure, § 169; Gen. Stats. of Massachusetts, 1860, ch. 129, §§ 40 *et seq.*, p. 658. There are similar provisions in other States.

(*q*) Tanner *v.* Bean, 4 B. & C. 312, overruling Jones *v* Morgan, 2 Camp. 474.

(*r*) Sedgwick *v.* Jager, 5 Car. & P. 199; Parks *v.* Edge, 1 Cromp. & M. 429, s. c. *nom.* Parker *v.* Ade, 1 Dowl. P. C. 643. See Alden *v.* Barbour, 3 Ind. 414.

an allegation that the bill was presented at a particular place need not be proved.(*s*)

The payee of a negotiable note may allege that the note is payable to himself, without stating *or order;* (*t*) but when the suit is by an indorsee, it seems that this allegation is not sufficient, because without this allegation it is not clear that the note is negotiable, and if it be not negotiable, the plaintiff has no right.

If the date of the instrument does not correspond with that described in the declaration, this discrepancy must be explained.(*u*) But where it is alleged that a note was made on a certain day, but not that it *bore date* on that or any other day, it is not considered a variance that the note bears date on a different day.(*v*)

The subject of alterations we shall consider in a subsequent chapter.(*w*) A discrepancy in the name must be reconciled.(*x*) And if a party appear on the bill or note by the initials only of his name, there should be evidence of identity.(*y*) And so where a note payable to A & Co. is sued by A and B, it must be proved that they were the component members of the firm at the time the note was given.(*z*)

In some of the States, proof of the signatures of the parties to negotiable paper is dispensed with by statute, or by the rules of court, unless they are put in issue by the defendant, or notice is given that such proof will be required. If required, the signature must be proved by calling an attesting witness, if any, or accounting for his absence,(*a*) and next by the usual proof of

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(*s*) Halstead *v.* Skelton, 5 Q. B. 86; Wilmot *v.* Williams, 7 Man. & G. 1017; Freeman *v.* Kennell, Chitty on Bills, p. 626.

(*t*) Fay *v.* Goulding, 10 Pick. 122; Smith *v.* M'Clure, 5 East. 476.

(*u*) Fitch *v.* Jones, 5 Ellis & B. 238; Fanshawe *v.* Peet, 2 H. & N. 1.

(*v*) Smith *v.* Lord, 2 Dowl. & L. 759, 9 Jur. 450. And so the statement that a bill of exchange was made on a particular day is not a material averment, and is supported by proof that it was made on a different day. Coxon *v.* Lyon, 2 Camp. 307, note.

(*w*) See chapter on Defences, *infra.*

(*x*) Willis *v.* Barrett, 2 Stark. 29; Jones *v.* Turnour, 4 Car. & P. 204; Forman *v.* Jacob, 1 Stark. 47; Leaphardt *v.* Sloan, 5 Blackf. 278

(*y*) Jones *v.* Turnour, 4 Car. & P. 204. See Palmer *v.* Stephens, 1 Denio, 471.

(*z*) Waters *v.* Paynter, Sittings at Westminster, 14th Dec. 1826, before *Abbott*, C. J.; Chitty on Bills, 9th Lond. ed., p. 637. See Williamson *v.* Johnson, 1 B. & C. 146, 2 Dow. & R. 281.

(*a*) Stone *v.* Metcalf, 1 Stark. 53; Richards *v.* Frankum, 9 Car. & P. 221; Crook

the handwriting by those who know it,(*b*) or by a comparison of

v. Frith, 2 Moody & R. 262; January *v.* Goodman, 1 Dallas, 208. If the attesting witness, on being called, does not recollect his signature, it is then competent to prove his handwriting by other witnesses. Quimby *v.* Buzzell, 16 Maine, 470; Gervis *v.* Baird, 2 Brev. 37; Shiver *v.* Johnson, 2 id. 397; Madden *v.* Burris, 1 id. 387. And so if the witness is unable to prove the signature, by reason of not having seen the defendant write his name, other evidence is admissible to prove it. In Lemon *v.* Dean, 2 Camp. 636, *Le Blanc*, J., speaking of Phipps *v.* Baker, 1 Camp. 412, said: "I will make no observation upon that case. It may be distinguishable, as there the instrument was a deed. But I am quite clear, that if the subscribing witness to a note, when called, cannot prove it, by reason of his not having seen it drawn, the plaintiff may proceed to prove by other means." See Fasset *v.* Brown, Peake, 23; Grellier *v.* Neale, id. 146. Where the attesting witness, on his answer in a deposition, left the fact of attestation in doubt, it was held that the plaintiff might introduce other evidence of the handwriting both of the witness and the party. Walker *v.* Warfield, 6 Met. 466. Where the maker of a note is a marksman, and the subscribing witness is out of the State, proof of the handwriting of the witness will be sufficient proof of the signature of the maker. Shiver *v.* Johnson, 2 Brev. 397. And in such case it can make no difference that it was known at the time of the execution of the note that the residence of the subscribing witness was abroad. Dunbar *v.* Marden, 13 N. H. 311.

(*b*) Lewis *v.* Sapio, Moody & M. 39; Ferrers *v.* Shirley, Fitzg. 195. And in an action on a foreign bill, it is evidence to go to a jury, that a person who saw the defendant write *once*, thinks the handwriting on the bill like that which he had seen him write on that occasion. Garrells *v.* Alexander, 4 Esp. 37. To prove the handwriting of the defendant in this case, the plaintiff called the clerk of the defendant's attorney. His evidence was, that he had seen the defendant sign the bail-bond in the cause, but had never seen him write on any other occasion. Being asked whether he believed the acceptance to be the handwriting of the defendant, he said he could form no belief on the subject; it was like the handwriting in which the bail-bond was subscribed, and was about to compare them together. Lord *Kenyon* told him he must form a judgment without such comparison of hands. He then looked on the bill again, and said it was like the handwriting in which the defendant had subscribed the bail-bond, but that he could not speak to any belief further than he had already done. Garrow, for the defendant, objected that there was not sufficient evidence, and that it would be of dangerous consequences to allow such loose evidence of a handwriting to charge a party with a debt. Lord *Kenyon:* "This is the case of a foreign bill of exchange, and I think there is evidence to go to the jury, and that I am bound to leave it to them. To be sure, mere comparison of hands is not admissible evidence of itself; that was Algernon Sidney's case; but there the witness had never seen him write; and the only evidence in the case was mere comparison of hands; but in the present case, the witness has seen the defendant write, and he speaks to the likeness the handwriting in which the bill is accepted bears to that which he has seen the defendant actually write; I therefore think that it is evidence to go to the jury." In Powell *v.* Ford, 2 Stark. 164, it was held that a person who has only seen a party write his surname is not competent to prove his handwriting to the Christian as well as surname to an acceptance. But the contrary was ruled in Lewis *v.* Sapio, Moody & M. 39, where a witness had only seen the acceptor write his name previous to the trial for the purpose of showing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill in question. Lord *Kenyon* rejected his testimony, as the defendant might write differently from his common mode pur-

signatures.(c) The cases turning upon the proof of signatures are numerous and diversified; and we cite in the notes those which seem to illustrate the rules or usages bearing upon this

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posely to establish a defence. Stranger *v.* Searle, 1 Esp. 14. So Whitmore *v.* Corey, 1 Harrison, 267. If the witness have never seen the party write, but has obtained his knowledge of the general character of the handwriting of the latter by having had correspondence with him, this is sufficient. But Lord *Kenyon*, in Carey *v.* Pitt, Peake, Add. Cas. 130, would not allow an inspector of franks to be asked whether a signature was a genuine handwriting. In that case, it was proposed to prove the defendant's acceptance to a bill of exchange by the inspector of franks, who stated that he had repeatedly seen franks in the defendant's name pass the post-office (he being a member of Parliament). "The farthest extent to which the rule had been carried," said Lord *Kenyon*, "was to admit a person who had been in the habit of holding an epistolary correspondence with the party to prove the handwriting from the knowledge he acquired in the course of that correspondence. A case reported in Fitzgibbon (Ferrers *v.* Shirley) was the first in which that evidence was admitted. That evidence was admitted on sound principles; for if, when letters are sent, directed to a particular person on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose handwriting it purports to be; but the franks sent to the office might be the defendant's handwriting, or they might be forgeries, as well as the present, for no communication was had on the subject with the defendant." So in Brigham *v.* Peters, 1 Gray, 139, it was held that a teller of a bank, who as such has paid many checks purporting to be drawn by a person who has a deposit account with the bank, but has not seen him write, is incompetent to testify to the handwriting of such person, if some of the checks so paid were forged. It was further held in this case, that a witness who testified that he saw one L. write upon some papers handed him by his clerk, but that he was not near enough to see what L. wrote; that he afterwards went up with the clerk to the counting-room, and the clerk had there some signed and indorsed notes; the same (the witness testified) that were handed back by L. to his clerk, was not competent to testify as to the genuineness of a signature on another note, purporting to be the signature of L.

(c) The cases are not uniform as to the admissibility of evidence by comparison of hands. Such evidence was admitted in Allesbrook *v.* Roach, 1 Esp. 351, where the defence to a bill of exchange was forgery. And this rule, that genuine signatures of the same person are admissible to enable the court and jury, by a comparison of hands, to determine upon the question of the genuineness of a signature, is adopted in Moody *v.* Rowell, 17 Pick. 490; Hammond's Case, 2 Greenl. 33; Lyon *v.* Lyman, 9 Conn. 55; Farmers' Bank of Lancaster *v.* Whitehill, 10 S. & R. 110; Baker *v.* Haines, 6 Whart. 284. So by statute in Iowa, Code, 1851, § 2404. But the paper with which the comparison is to be made must be unquestionably a genuine paper, and that must be shown beyond a doubt. Martin *v.* Maguire, 7 Gray, 177. And so it is held that witnesses may be called as experts to give evidence of their opinion of the genuineness of a signature, formed merely from a comparison of hands. Moody *v.* Rowell, 17 Pick. 490; Commonwealth *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55. And so it is held that experts may be examined to prove from the appearance of the signature whether it is a forgery or a genuine handwriting. Moody *v.* Rowell, *supra*. And see the American cases cited *supra*. Such evidence was admitted in Goodtitle *v.* Braham, 4 T. R. 497; but this authority has been called in question in subsequent cases in the English courts. Carey *v.* Pitt, Peake, Add. Cas. 130; Gurney *v.* Langlands, 5 B. & Ald. 330; Clermont

subject. The signature may, of course, be proved by the party's own admission; (*d*) and his admission or confession renders it unnecessary to call even a subscribing witness.(*e*)

The character and circumstances of the admission are, however, important; for an inadvertent and casual admission may not estop the party from disproving the signature.(*f*) Where there are several acceptors of a bill or makers of a note, the signature of each must be proved; and an admission by one will not in general bind the others.(*g*) So the admission of a partner will not prove the partnership except against himself; but where it is shown that a partnership existed at the date of the instrument, or time of acceptance, it will be sufficient to prove the handwriting of the partner who wrote the signature,(*h*) or an

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v. Tullidge, 4 Car. & P. 1. And see Doe *v.* Suckermore, 5 A. & E. 751. In England, it is the settled rule now, that genuine signatures of the party shall not be given in evidence to enable the jury to compare the handwriting. Macferson *v.* Thoytes, Peake, 20; Brookhard *v.* Woodley, id. 20, note. And so an expert is not allowed to testify from a comparison of signatures merely. Rex *v.* Cator, 4 Esp. 117; Gurney *v.* Langlands, *supra.* But where genuine signatures are contained in papers already in evidence in the cause for other purposes, this rule against the comparison of signatures has been so far modified as to allow the jury to compare the contested signature with them, as proof bearing upon the question of genuineness. Doe *v.* Newton, 5 A. & E. 514; Doe *v.* Suckermore, id. 703, 2 Nev. & P. 16; and see Solita *v.* Yarrow, 1 Moody & R. 133; Smith *v.* Sainsbury, 5 Car. & P. 196; Griffith *v.* Williams, 1 Cromp. & J. 47. A recent English statute declares that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. 17 & 18 Vict., ch. 125, § 27, August, 1854. The English rule that irrelevant papers shall not be introduced for the sole purpose of creating a standard of comparison of handwriting, is adopted in some of the United States. Jackson *v.* Phillips, 9 Cowen, 94, 112; Titford *v.* Knott, 2 Johns. Cas. 211; People *v.* Spooner, 1 Denio, 343; Pope *v.* Askew, 1 Ired. 16; Rowt *v.* Kile, 1 Leigh, 216.

(*d*) Hall *v.* Phelps, 2 Johns. 451, per *Spencer*, J. When a verbal admission is relied on, the identity of the note referred to must be satisfactorily established. Palmer *v.* Manning, 4 Denio, 131.

(*e*) Henry *v.* Bishop, 2 Wend. 575; Fox *v.* Reil, 3 Johns. 477; Hall *v.* Phelps, 2 id. 451; Williams *v.* Floyd, 11 Penn. State, 499; Mauri *v.* Hefferman, 13 Johns. 75; Shaver *v.* Ehle, 16 id. 201; Hodges *v.* Eastman, 12 Vt. 358.

(*f*) Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 id. 1, 27. In Holt *v.* Squire, Ryan & M. 282, an admission was unintentionally contained in a notice to produce papers describing the bill as accepted; and this was held *prima facie* evidence of the defendant's acceptance.

(*g*) Gray *v.* Palmers, 1 Esp. 135; Shirreff *v.* Wilks, 1 East, 48; Carvick *v.* Vickery, 2 Doug. 653, note.

(*h*) Thwaites *v.* Richardson, Peake, 16; Mason *v.* Rumsey, 1 Camp. 384; Galway

admission of it by one of the defendants.(*i*) When, however, a note is given in the name of the firm by one member thereof for his individual debt, the payee, in order to recover, must show, as we have already seen, the assent of the other partners to the giving of the note.(*j*) And so evidence of authority will be required when the paper is given on account of the partnership business, if it be unusual to give notes or bills in that business.(*k*)

In a suit against one of several makers of a joint and several promissory note, it is unnecessary to prove its execution by those not sued.(*l*)

In actions against companies upon paper signed by persons purporting to represent such companies, not only their signatures, but their authority or official capacity must be proved, unless such proof be dispensed with by statute.(*m*) Such official capacity may generally be proved by parol evidence. There may be some qualification of this rule when the action is against the company, and is before a court of the State in which the company is situated, so that there may be compulsory process by which its records may be produced.(*n*)

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v. Matthew, id. 403; Ridley *v.* Taylor, 13 East, 175; Pinkney *v.* Hall, 1 Salk. 126; Phaup *v.* Stratton, 9 Grat. 615; Davenport *v.* Davis, 22 Maine, 24. In Porter *v.* Cumings, 7 Wend. 172, the note sued on was signed by Adams and Thorp, and S. Cumings, and though the allegation in the complaint was that the defendants made their promissory note in writing, their own proper hands being thereunto subscribed, the plaintiff was allowed to prove that Adams and Thorp were partners, and that their signature to the note was in the handwriting of Thorp.

(*i*) Hodenpyl *v.* Vingerhoed, *coram Abbott*, C. J., 3d Jnly, 1818, Guildhall. cited in Chitty on Bills, 9th Lond. ed., p. 627. In Porthouse *v.* Parker, 1 Camp. 82, which was an action by the payee against the drawers of a bill of exchange, purporting to have been drawn by an agent of the firm upon one of the partners, it was held by Lord *Ellenborough* that the acceptance by the drawee was sufficient evidence against the three partners of the bill having been regularly drawn, and rendered it unnecessary to prove the authority of the agent.

(*j*) Dob *v.* Halsey, 16 Johns. 34, 38; Freeman *v.* Ross, 15 Ga. 252; Gansevoort *v.* Williams, 14 Wend. 138. See Ridley *v.* Taylor, 13 East, 175.

(*k*) Hedley *v.* Bainbridge, 3 Q. B. 316; Dickinson *v.* Valpy, 10 B. & C. 128; Brown *v.* Byers, 16 M. & W. 252; Mare *v.* Charles, 5 Ellis & B. 978.

(*l*) Chandler *v.* Lawrence, 3 Mich. 261.

(*m*) Dwight *v.* Newell, 15 Ill. 333; Small *v.* Sacramento Navigation & Mining Co., 40 Maine, 274; Marine Bank of the City of New York *v.* Clements, 3 Bosw. 600; Farmers and Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Exchange Bank *v.* Monteath, 24 Barb. 371.

(*n*) Cabot *v.* Given, 45 Maine, 144.

The law favors and protects all negotiations for peace; but an admission is in general receivable in evidence, if it be direct, distinct, and unreserved, and not for the mere purpose of settlement, though made in the course of negotiations for settling the cause, and under the faith of a compromise; (*o*) and such an admission may also be proved by an arbitrator, before whom it is made in the course of a reference. (*p*) It is an admission of the plaintiff's title if the defendant offer, without denial or reserve, after the note has become due, to give him another note instead of it, (*q*) or if he pay money into court generally on the whole declaration of the plaintiff. (*r*)

So the payment of part of the money due upon a bill, or asking time for payment, or promising to pay, will dispense with the necessity of proving the signature to an acceptance, (*s*) or the authority of an agent to accept, (*t*) and of the payee's indorsement, through which the plaintiff claims. (*u*)

The identity of each party must be proved; and now it is held to be sufficient, *prima facie*, if it is proved that the party has the same Christian name and surname. (*v*) If the subscribing

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(*o*) Waldridge *v.* Kennison, 1 Esp. 143; Gerrish *v.* Sweetser, 4 Pick. 373. It is otherwise, however, if the offer is confidential. Wallace *v.* Small, Moody & M. 446. The fact of an offer of a compromise is no evidence, because, as was observed by Lord *Mansfield*, "Men must be permitted to endeavor to buy their peace, without prejudice to them, if the offer do not succeed." Bull. N. P. 236. See Harrington *v.* Inhabitants of Lincoln, 4 Gray, 563.

(*p*) Gregory *v.* Howard, 3 Esp. 113.

(*q*) Bosanquet *v.* Anderson, 6 Esp. 43.

(*r*) 3 Phillipps on Ev., 4th Am. ed., p. 175; Gutteridge *v.* Smith, 2 H. Bl. 374.

(*s*) Helmsley *v.* Loader, 2 Camp. 450; Jones *v.* Morgan, id. 474; Vaughan *v.* Fuller, 2 Stra. 1246; Keplinger *v.* Griffith, 2 Gill & J. 296; Shaver *v.* Ehle, 16 Johns. 201

(*t*) Lindus *v.* Bradwell, 5 C. B. 583; Cotes *v.* Davis, 1 Camp. 485.

(*u*) Helmsley *v.* Loader, 2 Camp. 450; Bosanquet *v* Anderson, 6 Esp. 43.

(*v*) Greenshields *v.* Crawford, 9 M. & W. 314; Harrington *v.* Fry, Ryan & M. 90; Sewell *v.* Evans, 4 Q. B. 626; Roden *v.* Ryde, 4 Q. B. 629 – 634; Hamber *v.* Roberts, 7 C. B. 861. See Mead *v.* Young, 4 T. R. 28. It was at first held, in a few cases, that this was no evidence of identity. But from the inconvenience of this doctrine, the courts soon retraced their steps. "The transactions of the world," says Lord *Denman*, "could not go on if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised, and it is best that we should sweep it away as soon as we can." Sewell *v.* Evans, *supra*. Further evidence of identity may be required where the name is a very common one in the country. Jones *v.* Jones, 9 M. & W. 75. And so, perhaps, if the party to be fixed with liability was a marksman. Whitelocke *v.* Musgrove, 1 Cromp. & M. 511, 3 Tyrw. 541. Where the only difference in the names of the payee and indorser of a promissory note was the insertion of the

witness be dead, it is sufficient to prove his death and handwriting, without proving the handwriting of the defendant; (*w*) and this even where the defendant signed by mark.(*x*) Similar proof is sufficient in case of the blindness (*y*) or insanity of the witness.(*z*) If he signs by a mark only, any peculiarity in this may be shown; (*a*) and a signature by an agent with authority satisfies the allegation of signature by the party's own hand.(*b*)

The possession of the bill is *prima facie* evidence (and only that) that the possessor has a lawful claim to hold it.(*c*) If he had other documents going with the instrument, as a gen-

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initial of a middle name in the indorsement, it was held that it should be presumed that they were the same person. Hunt *v.* Stewart, 7 Ala 525. But the mere fact that the same name appears as that of the maker and of an indorser of a note, does not raise the presumption that it was made and indorsed by the same person. Curry *v.* Bank of Mobile, 8 Port. Ala. 360. In an action by Isaac and Jesse F on a note payable to I. and J. F., it is unnecessary, unless a mistake in the names is pleaded in abatement, to prove the Christian names of the payees. Vance *v.* Funk, 2 Scam 263. And see Salisbury *v.* Gillett, 2 Scam. 290.

(*w*) Nelson *v.* Whittall, 1 B. & Ald. 19; Barnes *v.* Trompowsky, 7 T. R. 265; Page *v.* Mann, Moody & M. 79; Kay *v.* Brookman, id. 286, 3 Car. & P. 555.

(*x*) Mitchell *v.* Johnson, Moody & M. 176; McDermott *v.* McCormick, 4 Harring. Del. 543.

(*y*) Wood *v.* Drury, 1 Ld. Raym. 734. But see Cronk *v.* Frith, 9 Car. & P. 197.

(*z*) Per Lord *Ellenborough*, in Currie *v.* Child, 3 Camp. 283; cited in Nelson *v.* Whittall, 1 B. & Ald. 22. note.

(*a*) George *v.* Surrey, Moody & M. 516.

(*b*) Lord *Ellenborough* at first held otherwise in Levy *v.* Wilson, 5 Esp. 180, in 1804, but ruled in conformity with the text in Jones *v.* Mars, 2 Camp. 305; Helmsley *v.* Loader, 2 Camp. 450. And so Lord *Tenterden* held in Booth *v.* Grove, Moody & M. 182, 3 Car. & P. 335. And to the same effect are Porter *v.* Cummings, 7 Wend. 172; Manhattan Co. *v.* Ledyard, 1 Caines, 192; Kane *v.* Scofield, 2 Caines, 368; Pease *v.* Morgan, 7 Johns. 468; Vallett *v.* Parker, 6 Wend. 615.

(*c*) See *supra*, chapter on Action. Per Lord *Mansfield*, in Peacock *v.* Rhodes, 2 Doug. 633; King *v.* Milsom, 2 Camp. 5; Bulkeley *v.* Butler, 2 B. & C. 434; Dugan *v.* United States, 3 Wheat. 172; Picquet *v.* Curtis, 1 Sumner, 478. This is so, notwithstanding the instrument has the holder's indorsement thereon to another person. Dollfus *v.* Frosch, 1 Denio, 367; Mottram *v.* Mills, 1 Sandf. 37. If there are circumstances of suspicion, the holder will be required to prove his title. Per Lord *Mansfield* in Grant *v.* Vaughan, 3 Burr 1627. Where a bill is drawn with the payee's name in blank, and the plaintiff inserts his own name as payee, he must adduce evidence to show he was intended as payee. Crutchly *v.* Mann, 1 Marsh. 29, 5 Taunt. 529. Where a note is made payable to A. B. generally, and there are a father and son of that name, although it is *prima facie* evidence of a promise to the father, and not to the son, yet if the son, being in possession of the note, brings an action on it, declaring upon it as payable to A. B. the younger, he is entitled to recover upon it. Sweeting *v.* Fowler, 1 Stark. 106; Stebbing *v.* Spicer, 8 C. B. 827.

nine letter of introduction from a correspondent, this presumption is strengthened.(*d*) And, in general, this presumption would be stronger in proportion as it would be easy to disprove it if it were erroneous.

If partnership must be proved, either for the plaintiff or in defence, it may be proved as any other fact; but not by the admissions of any one partner, except for the purpose of binding him; because, as to the rest, the question is whether the partnership exists; (*e*) that being proved, the admissions of any one in respect to partnership business affect his partners as his acts might do; and are evidence as to the acts of the firm.(*f*)

(*d*) Bulkeley *v.* Butler, 2 B. & C. 434, 3 Dow. & R. 625. Action by indorsee against acceptor on bill of 6th August, 1816, at thirty days' sight, payable to Edmund Shanahan or order, dated Lisbon. The bill was produced with an indorsement in the name of Edmund Shanahan; and to prove the indorsement, plaintiff's clerk was called, who proved that on 19th August, 1816, a person calling himself Edmund Shanahan, produced the bill to plaintiff at Cadiz, and wrote the indorsement upon it on the 20th; that at the same time on the 19th he produced two other bills, one for £640, which the clerk knew to be a genuine bill, drawn by M'Donnell & Co. of Lisbon; that this person first called on plaintiff 10th August, and produced a genuine letter of recommendation from M'Donnell & Co., describing the bearer as Edmund Shanahan, and that that person dined at plaintiff's every day from 6th of August to the 19th, and that he took a letter of credit from plaintiff in the name of E. Shanahan, on Gibraltar. At the trial it was insisted that there was no evidence that the person who indorsed was Edmund Shanahan, or the payee; but *Dallas*, C. J. being of opinion that there was, the case was brought by writ of error to the King's Bench, where it was held, that the evidence to prove the identity of Edward Shanahan was admissible and sufficient for the purpose; that the possession of the bill to which no person but Edmund Shanahan, the payee, or some one claiming under him, was entitled, was, whilst unexplained and unimpeached, *prima facie* evidence that he was Edmund Shanahan, the payee; that the possession of the letter of recommendation which no one but Edmund Shanahan could rightly have had, was, whilst unexplained and uncontradicted, *prima facie* evidence that he was Edmund Shanahan; and if this evidence were admissible, there was so much time for the right Edmund Shanahan to have come forward if this person were not the right Edmund Shanahan, and there were so many persons who could naturally be able to prove who was the right Edmund Shanahan, if this were not, that no doubt could be entertained of the sufficiency of the evidence. "Then was the direction of the Lord Chief Justice correct in point of law? I think it was; the law does not require such evidence of identity as would clog the negotiability of bills of exchange; the law requires such evidence as may reasonably satisfy the minds of the jury." Judgment affirmed.

(*e*) Tuttle *v.* Cooper, 5 Pick. 414, per *Wilde*, J. And see Bridge *v.* Gray, 14 Pick. 55, 61. In Saugster *v.* Mazarredo, 1 Stark. 161, it was held, in an action against four persons as acceptors of bills, that an admission by one, that he was in partnership with the other three, was evidence as against that one of a joint promise by all the four.

(*f*) Grant *v.* Jackson, Peake, 203; Wood *v.* Braddick, 1 Taunt. 104; Nicholls *v.* Dowding, 1 Stark. 81; Bridge *v.* Gray, 14 Pick. 55, 61.

We have already seen that many things which are essential to the plaintiff's case are proved by the proof of certain other things. The principle seems to be this; every new signer of negotiable paper gives a new credit to the paper, and his signature therefore implies that all previous proceedings were regular; (*g*) but, on the other hand, nothing is in this way implied, that is not involved in the indirect assertion of the party signing, that he will be responsible for all that purports to have been done before him.

Thus, if an acceptor be sued, his acceptance must be proved, if denied; but being proved, the signature of the drawer need not be proved, because that is a previous step to acceptance, and acceptance implies and warrants it; (*h*) and if it be drawn by procuration, the acceptance admits the authority.(*i*) But if a bill be drawn and indorsed before acceptance, the acceptance is neither admission nor warranty of the indorsement; (*j*) because, however it may have been in fact, in its true order the indorse-

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(*g*) Critchlow *v.* Parry, 2 Camp. 182; Lambert *v.* Oakes, 1 Ld. Raym. 443; Lambert *v.* Pack, 1 Salk. 127; Bass *v.* Clive, 4 Maule & S. 13; Taylor *v.* Croker, 4 Esp. 187; Herrick *v.* Whitney, 15 Johns. 240.

(*h*) Wilkinson *v.* Lutwidge, 1 Stra. 648; Jenys *v.* Fawler, 2 id. 946; Robinson *v.* Yarrow, 7 Taunt. 455; Leach *v.* Buchanan, 4 Esp. 226; Price *v.* Neal, 3 Burr. 1354; Smith *v.* Mercer, 6 Taunt. 76; Sanderson *v.* Collman, 4 Man. & G. 209; Pitt *v.* Chappelow, 8 M. & W. 616; Schultz *v.* Astley, 2 Bing. N. C. 544; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Walter *v.* Trustees of Schools, 12 Ill. 63; Peoria and Oquawka R. R. Co. *v.* Neill, 16 Ill. 269; McKleroy *v.* Southern Bank of Ky., 14 La. Ann. 458. In an action against the payee of a promissory note, who was likewise the indorser, *Gibbs*, C. J. ruled, from the analogy of a bill of exchange, where the acceptance is an admission of the handwriting of the drawer, that the indorsement by the payee is an admission of the handwriting of the maker. Free *v.* Hawkins, Holt, N. P. 550.

(*i*) Porthouse *v.* Parker, 1 Camp. 82; Robinson *v.* Yarrow, 7 Taunt. 455. The acceptance does not admit a procuration to indorse. Robinson *v.* Yarrow, *supra*; Dana *v.* Underwood, 19 Pick. 99. And see Peaslee *v.* Robbins, 3 Met. 164. Where the indorsement only stated the initial of the name of the principal, thus: "Per *pro.* H. Pickersgill, John Pickersgill," and the declaration averred that *Hannah* Pickersgill indorsed, not only her authority, but her Christian name, must be proved. Jones *v.* Turnour, 4 Car. & P. 204. It is supposed that in this case Lord *Tenterden* was of opinion that, as the defendant's acceptance admitted the authority to draw by procuration in that particular form, and as the indorsement was in the same form and handwriting, it might be taken to have been made with the same authority; and the opinion turned upon other particular circumstances.

(*j*) Robinson *v.* Yarrow, 7 Taunt. 455; Smith *v.* Chester, 1 T. R. 654; Free *v.* Hawkins, Holt, N. P. 550; per *Parke*, B., in Farr *v.* Ward, 2 M. & W. 844; Beeman *v.* Duck, 11 M. & W. 251.

ment should follow acceptance of a bill, as it should making of a note. If, therefore, the drawer draws the bill payable to himself, and at once indorses it, an acceptance admits the genuineness of the drawer's original signature, but not the genuineness of his indorsement.(*k*)

It has been said that the jury would probably infer the one signature from the admitted genuineness of the other. But we doubt both the reason and the authority of this remark. In themselves, the two signatures, one for drawing and the other for indorsing, are entirely distinct, as much so as if on different papers, and they often are and may always be made at different times and for different purposes; and the genuineness of either has little more tendency to prove the other, than any other genuine signature of the same party.

It is an unquestionable rule, that where a paper admitted or clearly proved to be genuine is already in a cause, and another paper pertinent to the issue, alleged to be in the same handwriting, is offered in evidence, the jury may compare the latter with the former. The reason of the rule is applied to the present question; and it has been held that the fact that the genuine and disputed signatures are both upon the same paper, cannot render a comparison by the jury any the less proper, and that such a comparison constitutes legitimate evidence.(*l*)

But while it is certainly the general rule that an acceptor is estopped from denying the genuineness of the drawer's signature, nevertheless, where a party becomes the holder of a bill before it has been accepted, and after it is accepted and paid the acceptor discovers that the bill is a forgery, and immediately gives notice of this fact to the holder, the acceptor may then, on proof of the forgery, recover the money paid through error. The reason of this is, that the loss had already attached upon the holder when the bill was accepted, and he is enabled to pro-

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(*k*) Bosanquet *v.* Anderson, 6 Esp. 43; Macferson *v.* Thoytes, Peake, 20; Smith *v.* Chester, 1 T. R. 654. See Drayton *v.* Dale, 2 B. & C. 293; Canal Bank *v.* Bank of Albany, 1 Hill, 287, 295. And see Coggill *v.* Am. Ex. Bank, 1 Comst. 113; Williams *v.* Drexel, 14 Md. 566. Where, however, a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer. Cooper *v.* Meyer, 10 B. & C. 468. And see also Schultz *v.* Astley, 2 Bing. N. C. 544.

(*l*) Williams *v.* Drexel, 14 Md. 566.

ceed against all other parties precisely the same as if the payment had not been made.(*m*) Where a bill of exchange was drawn by an infant, payable to himself, and indorsed, it was held, in an action against the acceptor, that his acceptance admitted the competency of the drawer to indorse.(*n*)

The accepting a bill drawn in the name of a firm purporting to consist of several persons, is an admission that there is such a firm, and that it consists of several, and the acceptor is not at liberty to prove the contrary.(*o*) And so the accepting a bill drawn by a person as executor admits his right to sue in that character.(*p*)

If the claim be against an indorser, and his signature be proved, this will imply and admit all the previous signatures which are necessary to make out the title of the plaintiff as well as the authority and legal capacity of the parties signing.(*q*) If there be six indorsements, all in blank, the holder may fill the first indorsement payable to the last indorser, and fill that payable to himself, and then he limits the admission of the last

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(*m*) McKleroy *v.* Southern Bank of Ky., 14 La. Ann. 458. The acceptor had done no act which induced the holder to believe the signature of the drawer to be genuine, at the time the bill was purchased.

(*n*) Taylor *v.* Croker, 4 Esp. 187.

(*o*) Bass *v.* Clive, 4 Maule & S. 13.

(*p*) Aspinall *v.* Wake, 10 Bing. 51.

(*q*) Lambert *v.* Pack, 1 Salk. 127; Lambert *v.* Oakes, 1 Ld. Raym. 443; Free *v.* Hawkins, Holt, N. P. 550; Critchlow *v.* Parry, 2 Camp. 182. This was an action by an indorsee against the indorser of a bill of exchange. The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff. Lord *Ellenborough* at first doubted whether it was not necessary in this case, as well as in an action against the acceptor, to prove all the indorsements that were mentioned in the declaration, and particularly that of the original payee. Clark, for the plaintiff, contended that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged, he would be liable; that he was to be considered as the drawer of a new bill of exchange; and that his contract was very different from that of the acceptor, who only undertook to pay to the payee, or his order, and against whom, therefore, a title through the payee must be established. Lord *Ellenborough* was of this opinion, and the plaintiff had a verdict. And so in Macgregor *v.* Rhodes, 6 Ellis & B. 266, per Lord *Campbell*, C. J., *Wightman* and *Erle*, JJ. concurring, *Crampton*, J. *dubitante*. In accordance with this decision, see Woodward *v.* Harbin, 1 Ala. 104; Prescott Bank *v.* Caverly, 7 Gray, 217, holding that the indorser cannot dispute the legal capacity of the payee to indorse, on the ground that she was a married woman; Bestor *v.* Walker, 4 Gilman, 3; Bestor *v.* Phelps, 17 Ill. 592; Young *v.* Patterson, 11 Rob. La. 7. And it seems that it would make no difference that the indorsement was made for the accommodation of a prior party, and the paper was transferred by such prior party to one having notice of the facts. Troy City Bank *v.* Lauman, 19 N. Y. 477.

indorsement to the genuineness of the signatures of the maker and the first indorser.(*r*) But he may, if he chooses to do so, deduce title to himself through all the indorsers, and then all the indorsements are admitted.

In an action by an indorsee against the drawer or acceptor of a bill, or the maker of a note, the indorsement of the payee must be proved ; (*s*) and this proof is required, although the bill or note, with the indorsement upon it, was shown to the defendant after it was due, and he did not then object to the title of the holder.(*t*)

If the first indorsement be in blank, or the instrument be payable to bearer, it is unnecessary to prove any subsequent indorsements, although they are in full.(*u*) But if the note be payable to A. B. or bearer, and it is indorsed in blank by the payee, and the holder declares upon the indorsement in an action against the maker, he must prove it, although the allegation be unnecessary, as he might have sued as bearer only.(*v*)

Not only is the genuineness of the previous signature admitted by an indorsement, but a vendor of a bill or note, by the mere act of sale, is regarded as impliedly warranting the genuineness of the signature, and he is therefore liable to his vendee for the consideration he has received from him for it.(*w*)

So a person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures of the makers and indorsers ; (*x*) and evidence that when offering them

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(*r*) Emerson *v.* Cutts, 12 Mass. 77 ; Tyler *v.* Binney, 7 Mass. 479 ; Smith *v.* Clarke, 1 Esp. 180.

(*s*) Blakely *v.* Grant, 6 Mass. 386; Smith *v.* Chester, 1 T. R. 654 ; Macferson *v.* Thoytes, Peake, 20 ; Robarts *v* Tucker, 16 Q. B. 560 ; Macfarlane *v.* Moses, 1 Cheves, 54 ; Youngs *v.* Bell, 4 Calif. 201 ; Hardesty *v.* Newby, 28 Misso. 567. As to what proof of authority to make the indorsement will be required in case the bill or note is payable to a company and indorsed by an officer thereof, see Cabot *v.* Given, 45 Maine, 144.

(*t*) Duncan *v.* Scott, 1 Camp. 100.

(*u*) Walwyn *v.* St. Quintin, 1 Bos. & P. 652 ; Chaters *v.* Bell, 4 Esp. 210 ; Smith *v.* Chester, 1 T. R. 654 ; Bosanquet *v.* Anderson, 6 Esp. 43 ; Walker *v.* Macdonald, 2 Exch. 527 ; Wilbour *v.* Turner, 5 Pick. 526 ; Blakely *v.* Grant, 6 Mass. 386.

(*v*) Waynam *v.* Bend, 1 Camp. 175.

(*w*) Aldrich *v.* Jackson, 5 R. I. 218.

(*x*) Cabot Bank *v.* Morton, 4 Gray, 156 ; Markle *v.* Hatfield, 2 Johns. 455 ; Herrick *v.* Whitney, 15 Johns. 240 ; Canal Bank *v.* Bank of Albany, 1 Hill, 287 ; Talbot *v.* Bank of Rochester, 1 Hill, 295.

for discount he said that they were good, and in case of non-payment he would see them paid, does not show a waiver by the bank of the implied warranty of the genuineness of the signatures.(*y*)

The indorsement may indeed be admitted in an action against the indorser, by any act which has the force of a confession, because, from the nature of the act, it must be grounded on a liability as indorser; as an offer to give a new bill for the old one,(*z*) or part payment, or a promise to pay,(*a*) if all or any of these things are done without any objection, denial, or reserve. And it is not necessary that the acknowledgment or confession should be made to the plaintiff or to an interested party.(*b*) But the indorser's admission will not be evidence of the fact against other parties.(*c*)

It has been held that an express promise by the acceptor of a bill, made at the time he accepted it, that he would pay it, is an admission of the indorsements upon it at the time it was presented for acceptance.(*d*) So if the drawer, who is also the payee of a bill, deliver it, with his name indorsed on it, to another, proof of such delivery with the name indorsed will dispense with direct proof of the indorsement.(*e*)

Where the acceptor of a bill has applied to the holder for time, and has offered terms, this is an admission by him of the holder's title, and a waiver of proof of all the indorsements upon the bill except the first.(*f*)

(*y*) Cabot Bank *v.* Morton, 4 Gray, 156.

(*z*) Sidford *v.* Chambers, 1 Stark. 326.

(*a*) Hankey *v.* Wilson, Sayer, 223; Bosanquet *v.* Anderson, 6 Esp. 43; Sidford *v.* Chambers, 1 Stark. 326. And so as against the maker of a note, his promise to an indorsee after it fell due to pay it, has been held an admission not only of his own signature, but of all the indorsements, superseding the necessity of further proof. Keplinger *v.* Griffith, 2 Gill & J. 296.

(*b*) McRae *v.* Kennon, 1 Ala. 295.

(*c*) Hemings *v.* Robinson, Barnes, 436; Western *v.* Wilmott, at Westminster Hall, 5th July, 1820, *coram Abbott*, C. J., cited in Chitty on Bills, 9th Lond. ed., p. 636. These cases seem to overrule Maddocks *v.* Hankey, 2 Esp. 647, where it was decided that the admission by the indorser of a promissory note of his handwriting is sufficient evidence of the indorsement in an action against the maker, because such admission is in derogation of the party's own title to the note.

(*d*) Hankey *v.* Wilson, Sayer, 223. And see Sidford *v.* Chambers, 1 Stark. 326; Gilmore *v.* Hague, 4 Dowl. Pr. C. 303.

(*e*) Glover *v.* Thomson, Ryan & M. 403.

(*f*) Bosanquet *v.* Anderson, 6 Esp. 43.

It has been held that admissions of record, or by pleading, are not evidence for the jury, because only the issue is given to them.(*g*) But this may be doubted as a universal rule, however true it may be in many cases.(*h*)

Where an indorser is sued, demand and notice may be proved by the record of a former action between the same parties, in which it was necessary to prove demand and notice, in order to establish the defendant's liability.(*i*)

If a drawer sues an acceptor, he must prove that he has taken the bill up, and this he may do by the evidence of the indorsee or payee to whom he paid the money, and from whom he received the bill.(*j*) But a receipt of payment on the back, which does not state from whom the money came, is not, if unexplained, even *prima facie* evidence that the drawer paid it, because the presumption would be that the acceptor complied with his engagements and paid the money himself.(*k*)

When an accommodation acceptor sues the drawer for money paid, he must prove payment by himself in addition to proof of the drawing of the bill and the absence of consideration ; (*l*) and the production of the bill by him is not *prima facie* evidence of his having paid it, without proof that it was in circulation after

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(*g*) This is the doctrine of the Court of Exchequer of England. Edmunds *v.* Groves, 2 M. & W. 642. See also Bennion *v.* Davison, 3 id. 179 ; Smith *v.* Martin, 9 id. 304 ; Carter *v.* James, 13 id. 137. This opinion seems to be adopted also in the Court of Common Pleas, by *Cresswell*, J. in Fearn *v.* Filica, 7 Man. & G. 513, and by Lord *Kenyon* in Gray *v.* Palmers, 1 Esp. 135.

(*h*) In Bingham *v.* Stanley, 2 Q. B. 127, it was said that "an admission made in the course of pleading, whether in express terms, or by omitting to traverse what has been before alleged, must be taken as an admission, for all purposes of the cause, whether the facts relate to the parties or to third persons, provided the allegation so made be material." See also Robins *v.* Maidstone, 4 Q. B. 811 ; Malpas *v.* Clements, 19 Law J., Q. B. 435.

(*i*) Wright *v.* Butler, 6 Wend. 284.

(*j*) Williams *v.* James, 15 Q. B. 498 ; Simmonds *v.* Parminter, 1 Wilson, 185. But it is not necessary to prove that the acceptor had effects of the drawer in his hands, that fact being *prima facie* admitted by the acceptance. Vere *v.* Lewis, 3 T. R. 182 ; Kendall *v.* Galvin, 15 Maine, 131 ; Byrd *v.* Bertrand, 2 Eng. Ark. 321.

(*k*) Scholey *v.* Walsby, Peake, 24 ; per Lord *Campbell*, C. J. in Williams *v.* James, 15 Q. B. 498. See also Phillips *v.* Warren, 14 M. & W. 379.

(*l*) Taylor *v.* Higgins, 3 East, 169 ; Chilton *v.* Whiffin, 3 Wilson, 13 ; Bullock *v.* Lloyd, 2 Car. & P. 119. The drawer is liable for costs incurred by the acceptor, though not paid. Bullock *v.* Lloyd, 2 Car. & P. 119. Upon proof that he was requested by the drawer to defend an action on the bill, he may recover the costs of this. Garrard *v.* Cottrell, 10 Q. B. 679.

it had been accepted ; (*m*) nor will payment be presumed from a receipt on the back of the bill, unless it be shown to be in the handwriting of a person authorized to receive payment of the bill.(*n*)

If the action be against an acceptor, the fact of acceptance must be proved.(*o*) This may be by proving the handwriting; and it has been said that a witness to handwriting must have seen the party write his name at the same length and in the same form in which it is written in the note ; (*p*) but this should hardly be given as a universal rule. If there be two or more acceptors, or makers, those not sued may be called by the plaintiff to prove the signatures of defendants.(*q*) And if they are joined in the action, and some are defaulted, they may be called.(*r*)

The time of acceptance needs to be proved only where the bill is payable after sight ; then the date of the acceptance is *prima facie* evidence.(*s*) If the acceptance have no date, a witness

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(*m*) *Per Curiam*, Jewell *v.* Parr, 13 C. B. 909 ; Pfiel *v.* Vanbatenberg, 2 Camp. 439, per Lord *Ellenborough*. This rule, however, applies only to cases where the acceptor declares against the drawer on a bill of exchange. In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts or bills accepted by the plaintiff, his possession of the draft is *prima facie* evidence of the payments charged in the account. Bell *v.* Norwood, 7 La. 95. And the possession by the drawee of a draft drawn by a planter upon his merchant or factor, in favor of a third person, is *prima facie* proof of the draft having been paid by the drawee. Succession of Penny, 14 La. Ann. 194. On the general proposition that possession of a bill of exchange, after it has been in circulation, is *prima facie* evidence that it has been paid, see Baring *v.* Clark, 19 Pick. 220 ; Lowney *v.* Perham, 20 Maine, 235 ; Lord *v.* Appleton, 15 Maine, 270 ; Picquet *v.* Curtis, 1 Sumner, 478 ; Hughes *v.* Hind, Wright, Ohio, 650 ; Wilson *v.* Goodin, id. 219 ; Mullen *v.* French, 9 Watts, 96.

(*n*) Pfiel *v.* Vanbatenberg, 2 Camp. 439. And see Scholey *v.* Walsby, Peake, 24 ; Phillips *v.* Warren, 14 M. & W. 379.

(*o*) 2 Greenleaf's Evidence, § 161.

(*p*) Powell *v.* Ford, 2 Stark. 164. But, *contra*, see Lewis *v.* Sapio, Moody & M. 39, where it was held that a witness who has seen a party to a bill of exchange write his surname only is competent to prove his signature.

(*q*) York *v.* Blott, 5 Maule & S. 71 ; Poole *v.* Palmer, 9 M. & W. 71.

(*r*) Pipe *v.* Steele, 2 Q. B. 733 ; Vance *v.* Collins, 6 Calif. 435.

(*s*) Glossop *v.* Jacob, 4 Camp. 227. In this case it appeared that the date of the acceptance over the name was in a different handwriting. The witnesses stated that it was usual for a clerk to write the word "accepted," with the date, and then for the drawee to subscribe his name. Lord *Ellenborough* left it to the jury to presume, in the absence of all proof to the contrary, that the date of the acceptance was written, with the privity of the defendant, at the time of accepting the bill. The mere production of

must prove it.(*t*) If the acceptance was oral only (which making cannot be), one who heard should be called; (*u*) and if by a servant, clerk, or agent, the acceptance itself must be proved, and also the agent's authority.(*v*) And this latter may be proved directly or indirectly by showing the usage of the agent to accept bills in this way for his principal, or some act of confirmation or adoption by the principal.(*w*)

If the agent's authority be in writing, this must be produced and proved.(*x*) The declarations of an agent in the making of a contract, where they accompany the transaction and this is within the scope of his authority, are admissible as part of the contract.(*y*) But his declarations, without oath, and in the absence of the party to be affected by them, and not in the exercise of his authority, are not admissible to prove the agency; (*z*) and his declarations, although made at the time of signing his

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a bill, with formal proof of the acceptor's handwriting, is *prima facie* evidence that the bill was accepted during its currency, and within a reasonable time of its date, such being the regular course of business. Roberts *v.* Bethell, 12 C. B. 778, 14 Eng. L. & Eq. 218. See Anderson *v.* Weston, 6 Bing. N. C. 296. And it is said in Pardessus, that if there be no date, it may be inferred to have been accepted on the date of the bill. 1 Pardess. 393. If the indorsement of a note, payable on time, contains no date, and there is no evidence to show when it was made, the presumption is, that the transfer of the note was made at or soon after its date. Balch *v.* Onion, 4 Cush. 559.

(*t*) Greenl. on Evidence, § 161.

(*u*) Greenl. on Evidence, Vol. II. § 161; Ward *v.* Allen, 2 Met. 53. The statute of New York, Vol. I. p. 768, §§ 6 – 9, providing that an acceptance not in writing is void, does not apply to an order not payable on its face in money and drawn on a particular fund. Morton *v.* Naylor, 1 Hill, 583. See Luff *v.* Pope, 5 Hill, 413, 7 id. 577.

(*v*) Coore *v.* Callaway, 1 Esp. 115; Sayer *v.* Kitchen, 1 Esp. 209; Johnson *v.* Mason, 1 Esp. 90; Heys *v.* Heseltine, 2 Camp. 604; Helmsley *v.* Loader, 2 Camp. 450; Attwood *v.* Munnings, 7 B. & C. 278; East India Co. *v.* Tritton, 3 id. 280; Page *v.* Lathrop, 20 Misso. 589; May *v.* Kelly, 27 Ala. 497. In an action against a defendant as acceptor of a bill of exchange, no evidence being given in whose hand the acceptance was written, it was held that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by defendant's wife, having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance. Goldstone *v.* Tovey, 6 Bing. N. C. 98, 8 Scott, 394.

(*w*) Barber *v.* Gingell, 3 Esp. 60; Furze *v.* Sharwood, 2 Q. B. 388. See Davidson *v.* Stanley, 2 Man. & G. 721. Where the principal, upon presentment of the bill, promised to pay it, this was a sufficient ratification of the agency. Lindus *v.* Bradwell, 5 C. B. 583; Prestwich *v.* Marshall, 4 C. & P. 594; Cotes *v.* Davis, 1 Camp. 485.

(*x*) Attwood *v.* Munnings, 7 B. & C. 278; Bank of Bengal *v.* Macleod, 7 Moore P. C. 35; Johnson *v.* Mason, 1 Esp. 89.

(*y*) Betham *v.* Benson, Gow, 45, 49; Langhorn *v.* Allnutt, 4 Taunt. 511.

(*z*) Clark *v.* Baker, 2 Whart. 340. And see Mussey *v.* Beecher, 3 Cush. 511.

principal's name, are inadmissible to prove his authority when this is questioned by the principal.(*a*) But one who purports to have acted as agent in signing negotiable paper may be called as a witness either to prove or to negative the fact of his being such agent.(*b*)

It must be shown that the defendant has broken his contract; and as he is entitled to the note on paying it, possession of it by the plaintiff is *prima facie* evidence on this point.(*c*) Where the defendant's promise, however, is impliedly on condition of due presentment, demand, and notice, these must be proved; but in treating of these topics heretofore, enough, perhaps, has been already said of the evidence in relation to them. It may be added, however, that an admission by the defendant, an indorser, that the maker had told him that demand had been made on him, is neither admission nor proof of a demand.

The question whether due diligence has been used in making a demand or in giving notice of dishonor, so as to charge an indorser, if there be conflicting evidence, is a mixed question of law and of fact, and is for the jury, under proper directions from the court as to what amounts to due diligence or certainty.(*d*)

When a second or any subsequent indorser is sued, he cannot offer evidence to show that the plaintiff directed a notary public to give notice of non-payment to the defendant, and to omit to give notice to a prior indorser, so that he was not charged; for it belongs to each indorser to see for himself that prior indorsers are fixed, if he would have a remedy over against them.(*e*)

If notice was given by a letter, or any writing, secondary evidence of the contents of this writing may be given without first showing a notice to produce the writing; (*f*) on the ground that

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(*a*) Brigham *v.* Peters, 1 Gray, 139.

(*b*) St. John *v.* McConnell, 19 Misso. 38; Brigham *v.* Peters, 1 Gray, 139.

(*c*) See chapter on Action.

(*d*) Wyman *v.* Adams, 12 Cush. 210; Tindal *v.* Brown, 1 T. R. 167. And so in Prescott Bank *v.* Caverly, 7 Gray, 217, 221, *Bigelow*, J. said: "If the facts are doubtful, or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not."

(*e*) Spencer *v.* Ballou, 18 N. Y. 327.

(*f*) King *v.* Beaumont, 7 J. B. Moore, 112, 3 Brod. & B. 288; Roberts *v.* Bradshaw 1 Stark. 28, per Lord *Ellenborough*, C. J.; these cases overruled Shaw *v.* Markham, Peake, 165; Langdon *v.* Hulls, 5 Esp. 156, to the contrary. In Ackland *v.* Pearce, 2

the letter or writing is itself a notice, and from the nature of it must supersede the necessity of an additional notice for its production. The post-mark will be *prima facie* evidence of the time and place of mailing a notice ; (*g*) and the genuineness of the post-mark may be proved by any witness conversant therewith, whether employed in the post-office or not.(*h*) So if the notice was sent by one of two duplicate notices, evidence of sending one of them may be given, and then the other offered to the jury without notice to the defendant to produce the notice.(*i*) And if it be proved that duplicate notices were written for the purpose of sending one, and that a letter was written at that time and sent to the defendant, and notice is given to the defendant to produce that letter, if he fails to do so it will be presumed that the letter contained the notice.(*j*)

In general, whenever it is necessary to prove the giving of notice, and whenever a party alleges certain information given to another party, and purposes to take advantage of it, it is not enough to prove the sending of a message containing the notice or information, or of sending a letter ; but there must be some proof that the notice or letter was received. The proof of notice, say the Supreme Court of the United States, may be made out in two ways. "1. That the bills had been duly protested for non-acceptance ; and due and legal diligence used in giving notice thereof to the parties on the bills, in which case the legal

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Camp. 599, *Le Blanc*, J. compared the notice of dishonor to a notice to quit, and ruled that secondary evidence of the contents of the notice might be given without a notice to produce it. So held also in Eagle Bank *v.* Chapin, 3 Pick. 180 ; Lindenberger *v.* Beall, 6 Wheat. 104 ; Faribault *v.* Ely, 2 Dev. 67 ; Leavitt *v.* Simes, 3 N. H. 14 ; Central Bank *v.* Allen, 16 Maine, 41. This rule of not requiring notice to produce a notice of dishonor, applies only to the bills *sued on*, and not to *other bills* of which it may be essential to prove notice. Kine *v.* Beaumont, *supra ;* Lanauze *v.* Palmer, Moody & M. 31. And see Aflalo *v.* Fourdrinier, Moody & M. 334, note, 6 Bing. 306 ; Bevan *v.* Waters, Moody & M. 235.

(*g*) Arcangelo *v.* Thompson, 2 Camp. 620 ; Rex *v.* Plumer, Rus. & R. 264 ; Kent *v.* Lowen, 1 Camp. 177 ; Fletcher *v.* Braddyll, 3 Stark. 64 ; Langdon *v.* Hulls, 5 Esp. 156 ; New Haven County Bank *v.* Mitchell, 15 Conn. 206. The rule is different, however, in criminal cases. Rex *v.* Watson, 1 Camp. 215.

(*h*) Abbey *v* Lill, 5 Bing. 299 ; Woodcock *v.* Houldsworth, 16 M. & W. 124 ; Fletcher *v.* Braddyll, 3 Stark. 64.

(*i*) Ackland *v.* Pearce, 2 Camp. 599, per *Le Blanc*, J. ; Roberts *v.* Bradshaw. 1 Stark. 28, per Lord *Ellenborough*, C. J. ; and see Kine *v.* Beaumont, 3 Brod. & B 288, 7 J. B. Moore, 112 ; Lanauze *v.* Palmer, Moody & M. 31 ; Johnson *v.* Mathews, 13 Johns. 470.

(*j*) Roberts *v.* Bradshaw, 1 Stark. 28; Hetherington *v.* Kemp, 4 Camp. 193.

presumption of its receipt in time would attach. 2. By proof that the notice actually came to hand in proper time, though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route. The fact of notice and its reception in due time are the only matters material to the drawer or indorser of a dishonored bill; the manner or place in which he receives such notice is immaterial; for all the objects to be answered by its reception, it is equally available to them. To the holder it is immaterial whether the evidence of notice consists in the legal presumption arising from due diligence, which supplies the place of specific evidence, and is binding on a jury as proof of the fact of its reception; or it is established by direct evidence, or such circumstances as will, in law, justify them in drawing the inference." Evidence of the routes and course of the post may be admissible upon either of these questions.(*k*) Where a letter is regularly deposited in a post-office, the presumption of law is that the letter went to the proper place, and to the proper person, at the proper time.(*l*) And so it is sufficient if it be proved that the notice was left at the defendant's house.(*m*)

(*k*) Dickins *v.* Beal, 10 Pet. 572.

(*l*) Saunderson *v.* Judge, 2 H. Bl. 509; Scott *v.* Lifford, 9 East, 347; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Woodcock *v.* Houldsworth, 16 M. & W. 124; Lindenberger *v.* Beall, 6 Wheat. 104; Bussard *v.* Levering, 6 Wheat. 102; Chapman *v.* Lipscombe, 1 Johns. 294; Ogden *v.* Cowley, 2 Johns. 274; Munn *v.* Baldwin, 6 Mass. 316; Shed *v.* Brett, 1 Pick. 401; Lord *v.* Appleton, 15 Maine, 270; Loud *v.* Merrill, 45 Maine, 516; Dickins *v.* Beal, 10 Pet. 572; Hartford Bank *v.* Hart, 3 Day, 491. But the notice should be put into the general post-office, or at least taken to a receiving house; and it is held that a delivery to a bellman in the street is not sufficient. Hawkins *v.* Rutt. Peake, Cas. 186; Parker *v.* Gordon, 7 East, 385. In a case where the letter of the cashier of a bank (the holder of the note sued on), addressed to and notifying the indorser of the note that it was held unpaid, and that he was held liable for its payment, was found in the letter-book of the bank, with this entry opposite: "Put into the post office at A." on the day of its maturity; and the cashier being dead, the defendant admitted that the entry was in his handwriting; it was held that this evidence was not sufficient to authorize the jury to find that payment had been demanded of the maker. Farmers' Bank of Maryland *v.* Duvall, 7 Gill & J. 78. But a book kept by a bank, in which a clerk regularly entered certificates of his having given notices to the makers and indorsers of promissory notes, taken in connection with his testimony that it was his practice to carry the notices personally to the house or place of business of the parties, and that he has no doubt they were carried as usual in the case of a certain note mentioned in the book, though he has no recollection in relation to such note, is competent and sufficient evidence to prove that notices were so given in the particular case. Shove *v.* Wiley, 18 Pick. 558.

(*m*) Stedman *v.* Gooch, 1 Esp. 3; Jones *v.* Marsh, 4 T. R. 464. So where left at his boarding-house, Bank of United States *v* Hatch, 6 Pet. 250.

Much that might be said in respect to the evidence of consideration has also been anticipated when treating of that topic. We have seen that the general rule of law as to the burden of proof — namely, that one who rests his case upon a simple contract must prove that the contract itself rests upon a consideration — does not apply generally to negotiable paper; the exceptions being, when the action is between immediate parties,(*n*) or when the defendant can show that he was defrauded of the note or bill,(*o*) or made it under duress,(*p*) or that it was negotiated after it was dishonored,(*q*) or that it was tainted with some objection which would defeat it in the hands of any party who did not take it for value.(*r*) The mere fact that the de-

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(*n*) See Chapter VI., *supra*, Vol. I. p. 185, and Burnham *v.* Allen, 1 Gray, 496; Delano *v.* Bartlett, 6 Cush. 364; Child *v.* McKean, 2 Miles, 192; Welch *v.* Watts, 9 Ind. 115.

(*o*) See Chapter VI., *supra*, Vol. I. p. 188, and Rees *v.* Headfort, 2 Camp. 574; Paterson *v.* Hardacre, 4 Taunt. 114; Duncan *v.* Scott, 1 Camp. 100. And so where it is shown that the party, when he entered into the contract, was in such a state of drunkenness as not to know what he was doing. Gore *v.* Gibson, 13 M. & W. 623.

(*p*) Duncan *v.* Scott, 1 Camp. 100, per Lord *Ellenborough*. But a duress of goods for which the negotiable instrument is given, will not have this effect. Skeate *v.* Beale, 11 A. & E. 983; and see Wakefield *v.* Newbon, 6 Q. B. 276; Kearns *v.* Durell, 6 C. B. 596.

(*q*) When it is pleaded that the defendant took the bill after it was due, it lies on the defendant to begin by proving that the bill was due when dishonored. Lewis *v.* Parker, 4 A. & E. 838.

(*r*) Bailey *v.* Bidwell, 13 M. & W. 73; Edmunds *v.* Groves, 2 id. 642; Berry *v.* Alderman, 14 C. B. 95; Heath *v.* Sansom, 2 B. & Ad. 291. Per *Eyre*, C. J., in Collins *v.* Martin, 1 Bos. & P. 648; Harvey *v.* Towers, 6 Exch. 656. Per *Pollock*, C. B., White *v.* Springfield Bank, 1 Barb. 225; Boyd *v.* McIvor, 11 Ala. 822; Coddington *v.* Bay, 20 Johns. 637; Jones *v.* Swan, 6 Wend. 589; Hart *v.* Palmer, 12 Wend 523; Holme *v.* Karsper, 5 Binney, 469; Perrin *v.* Noyes, 39 Maine, 384; Middletown Bank *v.* Jerome, 18 Conn. 443; Thompson *v.* Shepherd, 12 Met. 311; Bush *v.* Peckard, 3 Harring. Del. 385. There was much confusion in the earlier cases; but the rule was stated by *Parke*, J., in Heath *v.* Sansom, *supra*, which has since been adopted both in the Exchequer Court and King's Bench. The latter case is quoted with approval by Lord *Campbell*, C. J., in Smith *v.* Braine, 16 Q. B. 244. The court expressly overrule the case of Brown *v.* Philpot, 2 Moody & R. 285, where Lord *Denman* is reported to have ruled that, after the defendant had proved that the bill was accepted by him without consideration, and that it had been fraudulently indorsed, without consideration, to the person who indorsed it to the plaintiff, the defendant was further bound to prove in support of the plea by express evidence, that the bill had been indorsed to the plaintiff without consideration. The question coming before the court again in 1855, in Fitch *v.* Jones, 5 Ellis & B. 238, 244; and again, in 1856, in Mather *v.* Maidstone, 1 C. B., N. S. 273; the law was held to be as stated in the text.

fendant made it without consideration will not, of itself, put the plaintiff to his proof of consideration.(*s*)

Where the want of consideration is a good defence, and evidence is given upon the one side and upon the other of the fact of consideration, the burden of proof is on the plaintiff throughout to satisfy the jury, upon the whole evidence, of that fact; (*t*) although the *prima facie* evidence arising from the signature and the production of the note is sufficient to sustain the burden of proof on the part of the plaintiff, and is conclusive unless rebutted and controlled by counter proof.(*u*)

This presumption in favor of the validity of negotiable paper applies as well to such as is made by incorporated companies through their officers, the burden of proof being with the defendant to show the want of consideration, or that the paper was made for purposes not within the legitimate powers of the company.(*v*)

If the defendant deny that there was any consideration, he must show this as between himself and the plaintiff, however numerous the parties may be who are between them; as in an action by a third indorsee against the acceptor, the defendant cannot put the plaintiff to prove consideration, by giving *prima facie* evidence to show the want of it, merely as between the drawer and his indorsee, and each subsequent indorser and indorsee; but he must also show the want of it as between himself and the drawer.(*w*)

It sometimes happens that witnesses who alone could prove

(*s*) Jacob *v.* Hungate, 1 Moody & R. 445; Percival *v.* Frampton, 2 Cromp. M. & R. 180; per *Campbell*, C. J., in Fitch *v.* Jones, 5 Ellis & B. 238. 245. Per *Tindal*, C. J., in Low *v.* Chifney, 1 Bing. N. C. 267, 1 Scott, 95; Whitaker *v.* Edmunds, 1 A. & E. 638; Mills *v.* Barber, 1 M & W. 425, Lord *Abinger*, C. B. See also French *v.* Bank of Columbia, 4 Cranch, 141; Hilton *v.* Smith, 5 Gray, 400; Stoddard *v.* Kimball, 6 Cush. 469; Work *v.* Kase, 34 Penn. State, 138. In Florida, it is held that where the failure of consideration is pleaded under oath according to statute (Dig. 331) the *onus* of proving consideration is thrown upon the plaintiff. Prescott *v.* Johnson, 8 Fla. 391.

(*t*) Delano *v.* Bartlett, 6 Cush. 364, per *Fletcher*, J. And see Swain *v.* Ettling, 32 Penn. State, 486.

(*u*) Burnham *v.* Allen, 1 Gray, 496, per *Shaw*, C. J.

(*v*) Belmont *v.* Coleman, 1 Bosw. 188; Attorney-General *v.* Life & Fire Ins. Co., 9 Paige, 470; Safford *v.* Wyckoff, 4 Hill, 442.

(*w*) Whitaker *v.* Edmunds, 1 A. & E. 638, and per *Patteson*, J., in Heydon *v.* Thompson, 1 A. & E. 210, 3 Nev. & M. 319, 324.

important facts are dead at the time of trial, but have left books of record, or entries in journals or books of account, which would tend to prove the same facts. As the general rule in such cases, we should infer from the decisions, which, however, are not entirely clear or uniform, that such entries are admissible, where they are in the nature of entries of record, and where they are made by one who in making them acts in an official, or perhaps in a quasi official character.(*x*)

This has been applied to a notary public,(*y*) or to a messenger of a bank who was sworn to the discharge of his duties, one of which was to keep the book; (*z*) and to the cashier of a bank.(*a*)

And an entry in the books of a deceased notary of the facts of demand of payment and notice of non-payment, even where these are not required by law to be by a notary, as in the case of an inland bill or promissory note, may be given in evidence to prove these facts, where it is shown, or known, that it is the general practice to employ a notary for this purpose.(*b*) But if a notary be living, even his formal protest does not prove demand and notice without his personal testimony to it.(*c*)

But the entry can, of course, have no further effect than similar testimony of the notary on the stand would have. Thus an entry that notice to an indorser had been put into the post-office, without saying what, or where the indorser resided, or how it was directed, or that any inquiry had been made to ascertain his residence, was not sufficient evidence of notice.(*d*)

(*x*) Halliday *v.* Martinet, 20 Johns. 168; Hatfield *v.* Perry, 4 Harring. Del. 463.

(*y*) Sutton *v.* Gregory, Peake, Add. Cas. 150; Price *v.* Torrington, 1 Salk. 285; Hagedorn *v.* Reid, 3 Camp. 379; Halliday *v.* Martinet, 20 Johns. 168; Sheldon *v.* Benham, 4 Hill, 129; Nichols *v.* Goldsmith, 7 Wend. 160; Butler *v.* Wright, 2 Wend. 369; Hart *v.* Wilson, 2 id. 513; Portas *v.* Paimboeuf, 1 Mart. La. 267; Homes *v.* Smyth, 16 Maine, 181; Barnard *v.* Planters' Bank, 4 How. Miss. 98.

(*z*) Welsh *v.* Barrett, 15 Mass. 380.

(*a*) Nichols *v.* Goldsmith, 7 Wend. 160.

(*b*) Nicholls *v.* Webb, 8 Wheat. 326. And see Whittington *v.* Farmers' Bank, 5 Harris & J. 489.

(*c*) See chapter on Protest, *supra*, Vol. I. p. 633; Whittington *v.* Farmers' Bank, 5 Harris & J. 489; per *Story*, J. in Nicholls *v.* Webb, 8 Wheat. 326; Hatfield *v.* Perry, 4 Harring. Del. 463; Bradley *v.* Davis, 26 Maine, 45.

(*d*) Halliday *v.* Martinet, 20 Johns. 168; Farmers' Bank of Md. *v.* Duvall, 7 Gill & J. 78; Portas *v.* Paimboeuf, 1 Mart. La. 267. The indorsement of a clerk in the office of a notary upon the protest of a note for non-payment, that notice was duly served, is not evidence. Whitehead *v.* Jones, 2 McLean, 28.

So the oath of a notary that he had protested this bill, and was generally in the habit of giving notice on protested bills, and was desired to be particular in this case, and presumed that notice was sent, but had no distinct recollection about giving notice to this defendant, was not sufficient evidence of notice.(y)

But where a notary swore to his own memorandum of notice on the back of the protest, and that he never made the memorandum until after he gave the notice, and that he had no doubt of giving the notice in this case, this was not held to be sufficient.(z)

It may be added, that the testimony of a notary that he sent notice is admissible, without producing a copy of the notice, or proving its contents.(a)

It has been held, that the register of a notary is no evidence after the death of the notary, if the entries were made by a clerk who is still alive, although in the name of usual absence and out of reach.(b) Nor is the *ex parte* affidavit of a notary's clerk to the effect that he gave notice to the indorser, receivable as evidence after the death of the witness.(c) Nor is it admissible evidence that a clerk was heard to inquire where an indorser lived, as he

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(x) Bird v. Baldwin, 2 Mart. La. 539. But where, under similar circumstances, a notary deemed that it was usual for him to send notices if dishonor by post on the evening of the day the protest was made, and he had no doubt notice was duly given in this manner, this was held sufficient evidence. Miller v. Hackley, 5 Johns. 375. See Hemmenway v. Kemp, 4 Camp. 268, and Tassey v. Williams, Moody & M. 146. In New Haven Co. Bank v. Mitchell, 5 Conn. 206, a witness called to prove service of notice testified that the bank, of which he was a clerk, received a notice of dishonor, and that he then made the following memorandum on the back of it: "Delivered the notice to M. Jones, [Ind. B. Teller" — and stated from the memorandum and the fact of receiving the notice, which he recollected he had to do, that he delivered the notice, although he had no recollection of having delivered it, and it was held that his testimony was admissible evidence of the service of notice. In Canan v. Bank of the State, 4 Ala. 548, it was held that the testimony of the holder and his employer, that they believe, and have no doubt, that notice of non-payment of a bill was duly sent to the party to be charged, directed to the drawer as believing from the course of business of the bank, is sufficient to authorize a jury to infer that the business for-warded here or written was mailed; and that, if the opposite party wish to inquire what the endorser is to say, he will not be allowed afterwards to assert that nothing is proved by it. See Wheeler v. Morrison, 1 Fla. 25.

(y) Bullard v. Wilson, 17 Mart. La. 394. And see Miller v. Hackley, 5 Johns. 375.

(z) Downes v. Dean, 10 Pet. 512.

(a) Wilder v. Seldon, 5 Cowen, 162.

(b) Farmers' Bank v. Whitehill, 10 S. & R. 99.

was going to write him word, and that upon hearing that we [illegible] [illegible] [illegible]

and such will be the effect of an admission contained in a letter.(*r*)

If there has been a waiver of demand and notice, this may be shown by parol evidence, or inferred from the circumstances and facts of the transaction.(*s*)

Proof that the drawer made the bill payable at his own house has been held to afford presumptive evidence that it was drawn for his accommodation, and *prima facie* dispenses with proof of regular notice to him of dishonor.(*t*) So also does proof that the drawer had no effects in the hands of the drawee from the time it was drawn until it became due.(*u*)

When the original promise or acceptance is void for usury or other cause, the contract then becomes, as it respects the indorser, like a draft accepted without funds, he having no demand which he could lawfully assign in the hands of the promisor, and he is liable without notice of dishonor.(*v*)

As a protest is necessary by the law merchant in the case of foreign bills, and it is a distinct act, so we should say the certificate of protest, duly authenticated, was evidence of all the facts which it properly asserted, and therefore evidence not only of presentment, demand, and dishonor, but of such notice as it asserts to have been given.(*w*) On the other hand, the protest of inland bills, however common, is not necessary by the law

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Savage, 6 Wend. 658; Farmers', &c. Bank *v.* Catlin, 13 Vt. 39; Moore *v.* Ayres, 5 Smedes & M. 310.

(*r*) Derickson *v.* Whitney, 6 Gray, 248.

(*s*) Patterson *v.* Vose, 43 Maine, 552; Fuller *v.* McDonald, 8 id. 213; Lane *v.* Steward, 20 id. 98; Sanborn *v.* Southard, 25 id. 409.

(*t*) Sharp *v.* Bailey, 9 B. & C. 44.

(*u*) See *supra*, Vol. I. p. 532. Bickerdike *v.* Bollman, 1 T. R. 405; Brown *v.* Maffey, 15 East, 216; France *v.* Lucy, 1 Ryan & M. 341; Claridge *v.* Dalton, 4 Maule & S. 229; Legge *v.* Thorpe, 12 East, 171.

(*v*) Copp *v.* M'Dugall, 9 Mass. 1. This was an action on a promissory note by an indorsee against the indorser. The plaintiff having failed to recover against the promisor because the original contract was usurious, the indorser, who was the original payee, was held liable without notice. The case was considered analogous to that of a bill of exchange, where the drawer is proved to have had no funds in the hands of the drawee or acceptor, and to have suffered no prejudice as to the demand or remedy against him.

(*w*) See chapter on Protest, *supra*, Vol. I. p. 633. Dickerson *v.* Turner, 12 Ind. 223. Although the protest may not of itself show a sufficient demand and notice to entitle the party offering it to recover, it is admissible in evidence, and objections to it go only to the effect of the evidence. Treon *v.* Brown, 14 Ohio, 482.

merchant, and when made is extra-official, and therefore a certificate or record of it is not evidence either of presentment, demand, or dishonor, or of notice to any party.(x)

(x) See chapter on Protest, *supra*, Vol. I. p. 633. Young *v.* Bryan, 7 Wheat. 146 Union Bank *v.* Hyde, 6 id. 572; Nicholls *v.* Webb, 8 id. 326; Bank of U. S. *v.* Leathers, 10 B. Mon. 64; Bond *v.* Bragg, 17 Ill. 69; Kaskaskia Bridge Co. *v.* Shannon, 1 Gilman, 15; McAllister *v.* Smith, 17 Ill. 328; Whittington *v.* Farmers' Bank, 5 Harris & J. 489; Carter *v.* Burley, 9 N. H. 558; Bernard *v.* Barry, 1 Greene, Iowa, 388, Schoneman *v.* Fegley, 7 Barr, 433; Real Estate Bank *v.* Bizzell, 4 Pike, 189. In some States the notarial protest is made evidence of all the facts stated therein, by statute. See *supra*, Vol. I. p. 635; and see Loud *v.* Merrill, 45 Maine, 516; Ricketts *v.* Pendleton, 14 Md. 320. When the statute of a State makes a notary's certificate as to demand and notice legal proof of the facts which it embraces in the courts of that State, it is still inadmissible in the courts of another State, where its admission would supersede its own rules of evidence. Kirtland *v.* Wanzer, 2 Duer, 278. See chapter on Law of Place, *supra*.

CHAPTER XV.

OF DEFENCES

ALMOST any failure or error of a party to negotiable paper, or of a holder to it, may become the ground of defence, or enter into the questions raised by the defence. Under this head, therefore, it would be possible to present almost the whole law of negotiable paper. Nor is it easy to draw the line between those points or principles of defence which are more properly considered in other parts of this work, and those which may better be omitted elsewhere, or, if mentioned in other places, more fully stated here. Of the topics which it is thought best to treat at some length in this chapter, the law is in many respects obscure, if not unsettled, and its rules and principles deducible only from the comparison of many cases; and it has seemed desirable to present the law more by exhibiting its effect in decisions, than has been done in some other parts of this work. For practical purposes, and as an assistance to the profession in the investigation of the rights, liabilities, and remedies of their clients, nothing in relation to the law of bills and notes can be more important than a knowledge of the defences which may be against actions on negotiable paper.

It has been thought best to present to the reader in this chapter principally those defences which rest upon the allegation of a different bargain between the parties, which may be parol, and if parol either contemporaneous, or subsequent, or written, or contained in or implied by memoranda which are attached to the paper. Or it may rest upon the allegation of alterations; and here important questions will be, whether the alteration be material or otherwise, and whether it amounts to forgery. We shall treat also of the defences resting on Set-off; on Tender; and on the Statute of Limitations.

Before, however, proceeding to the consideration of these sub-

jects it may be proper to remark, that the defence to a suit on a note or bill, must be either against its form or against its merits. In the former case, it is regulated by the rules of Pleading. In the latter, the defence may arise from many causes; for example, want, failure, part failure, or illegality of consideration; loss or non-production of the note; fatal irregularity or ambiguity in the promise; want of due presentment and demand; or of due notice of dishonor and protest; payment, or payment by a new note, or by accord and satisfaction, or release; discharge under insolvency laws; denial of the signature.

These are the topics of defence which have already been sufficiently considered in other chapters, and we now proceed to the other defences above specified. And in considering them we shall, of course, rely principally upon decisions and authorities arising out of suits on bills and promissory notes.

Before entering upon special and particular defences, resting upon other bargains, it may be well to remark that the general defence to a note, that it was agreed by the parties that it should be wholly void, or that the promisor should not be held in any way, is wholly inadmissible, and a plea to that effect would not be sustained.(*a*)

SECTION I.

THE DEFENCE OF A DIFFERENT BARGAIN.

1. *Of Contemporaneous Oral Agreements.*

If the defendant endeavors to prove an oral bargain between himself and the plaintiff, which differs in its terms from the written note, it will then be remembered, that it is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to, or subtract from, the absolute terms of the written contract.(*b*) The exceptions to this rule are cases

(*a*) Moies *v.* Bird, 11 Mass. 436.

(*b*) See in general Richards *v.* Thomas, 1 Cromp. M. & R. 772; Edwards *v.* Jones, 2 M. & W. 414, 418; Peterson *v.* Willing, 3 Dallas, 506; Hopper *v.* Eiland, 21 Ala. 714; Sylvester *v.* Staples, 44 Maine, 496; Cooper *v.* Tappan, 4 Wisc. 362; Hightower *v.*

of fraud, illegality, and of want of consideration. The reason of the rule is apparent. "It would be inconvenient," says Lord Coke, "that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by the averment of the parties, to be proved by the uncertain testimony of slippery memory."(*c*)

In all cases of oral stipulations alleged to have been made contemporaneously with a written contract, it may be asked why the verbal condition, if bargained for, was not put in writing also. If the rest of the agreement was sufficiently important to authorize written evidence of its execution, why except the remainder? The obvious inference must be, that all that the parties did in fact agree to was put into due written form; and that all collaterals and appendages, concerning which there was merely conversation, was precisely what they could not agree upon. This, of course, is not always the true inference, but it is, of necessity, the legal inference. And the rule that an absolute note cannot be varied by evidence is held in equity as in law.(*d*)

The rule just referred to applies to all forms of written agreements,(*e*) to sealed notes or bonds given for the price of goods sold,(*f*) to agreements to deliver property,(*g*) to bonds to pay

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Ivy, 2 Port. Ala. 308; Dupuy *v.* Gray, Minor, 357; Wesson *v.* Carroll, id. 251; Foster *v.* Stafford, 14 Ala. 714; Phillips *v.* Longstreth, 14 id. 337; Sommerville *v.* Stephenson, 3 Stew. 271; Codwise *v.* Gleason, 3 Day, 12; Ellis *v.* Hamilton, 4 Sneed, 512; Cobb *v.* O'Neal, 2 id. 438; Hollenbeck *v.* Shutts, 1 Gray, 431; Abrams *v.* Pomeroy, 13 Ill. 133; Mead *v.* Steger, 5 Port. Ala. 498; Goddard *v.* Cutts, 11 Maine, 440; Paysant *v.* Ware, 1 Ala. 160; Dozier *v* Duffee, id. 320; Dow *v.* Tuttle, 4 Mass. 414; Sanborn *v.* Southard, 25 Maine, 409; Wheelock *v.* Freeman, 13 Pick. 165; Spann *v.* Baltzell, 1 Fla. 301; Leonard *v.* Smith, 11 Met. 330; Hauck *v.* Hund, 1 Bosw. 431; Price *v.* Perry, 4 Const. R. 31; Rugely *v.* Davidson, id. 33. "By the indorsement, all the plaintiff undertook to do, was to demand payment of the maker. By the alleged parol agreement, he was to bring suit, obtain judgment, issue execution. If I do not suffer more than a Babylonish confusion of language and ideas, I think I may venture to say the parol evidence does control, add too, and vary, the legal import and effect of the indorsement." Per *Cheves*, J., dissenting, ibid. p. 52.

(*c*) Rutland's Case, 5 Rep. 25.

(*d*) Pooley *v.* Harradine, 7 Ell. & B. 431; Strong *v.* Foster, 17 C. B. 201; Davies *v.* Stainbank, 6 De Gex, M. & G. 679.

(*e*) Curtis *v.* Wakefield, 15 Pick. 437.

(*f*) Duff *v.* Ivy, 3 Stew. 140; Lane *v.* Price, 5 Misso. 101; Donaldson *v.* Benton, 4 Dev. & B. 435.

(*g*) Paymond *v.* Roberts, 2 Aikens, 204; Wakefield *v.* Stedman, 12 Pick. 562.

up stock,(*h*) to custom-house bonds,(*i*) to insurance policies,(*j*) to a power of attorney,(*k*) and not only to all mercantile contracts, but equally to all deeds, leases, and other conveyances and contracts concerning real property.

So, in general, no evidence of another agreement can be received which amounts simply to a denial or defeasance of the note, unless it has the effect of fraud. Thus, it has been held, that a parol declaration of the holder to the surety, that he would exonerate him, and look to the principal only, is a good defence, on the ground that it lulls the party into security, and prevents him from obtaining his indemnity. But the true ground of this rule, if it be one, is, that it would be fraud on the part of the holder, afterwards, contrary to such assurance, to call upon the surety.(*l*)

2. *Of such Agreements as to the Time of Payment.*

In an action on a promissory note or bill of exchange, the defendant cannot show an oral agreement entered into when it was drawn, that it should be renewed, and that payment should not be demanded at maturity.(*m*) But if issue is taken on a plea of a contemporaneous oral agreement to renew, by paying discount, and an offer to perform the agreement, evidence of the agreement will be received, although it be suggested that the plea is bad as setting up a verbal contract to vary a note. This ruling, however, is obviously upon a technical point of pleading. The plaintiff having taken issue upon the plea, it comes before the court simply as a question of fact, whether the plea be true or not.(*n*)

So, in a note payable at a time certain, indorsed by the de-

(*h*) Railsback *v.* Liberty, &c. Turnpike Co., 12 Ind. 656; Madison, &c. Plank-Road Co. *v.* Stevens, 6 id. 379.

(*i*) United States *v.* Thompson, 1 Gallis. 388.

(*j*) Lewis *v.* Thatcher, 15 Mass. 431; Kaines *v.* Knightly, Skin. 54.

(*k*) Hunt *v.* Rousmanier, 8 Wheat. 174.

(*l*) Harris *v.* Brooks, 21 Pick. 195.

(*m*) Hoare *v.* Graham, 3 Camp. 57; Dukes *v.* Dow, Chitty on Bills, 9th ed. 143. Defence and proof that plaintiff, at the time of receiving the note in suit, verbally agreed to give the defendant time, if it was not convenient to the latter to pay at maturity. *Gibbs*, C. J. held that the evidence could not be admitted to annul the very terms of the written contract, and defeat its obligation. See also the same point in Bowerbank *v.* Monteiro, 4 Taunt. 843; Bond *v.* Morley, 26 Misso. 253.

(*n*) Holt *v.* Miers, 9 Car. & P. 191; compare Gillett *v.* Whitmarsh, 8 Q. B. 966.

fendant as security for the maker's debt, evidence of a parol agreement at the time of making and indorsing the note, that payment should not be demanded till after sale of the maker's estates, cannot be received as a waiver of the indorser's right to notice.(*o*)

Nor can a contemporaneous verbal agreement show that a note payable on demand, by its face, should not be payable till after the decease of the maker.(*p*) Nor is a similar agreement of the payee's good, to receive ten per cent of the amount of the note at maturity, and a new note running seven months from that date for the balance.(*q*)

A parol agreement at the execution of a post-dated check, cannot show that payment was not to be demanded at maturity, but that time was to be given at the election of the drawer.(*r*)

An oral agreement is not admissible which would make of a note regular and absolute in form, a mere memorandum, and cause the maker to be only an agent to collect, and to pay only when he may collect, other demands.(*s*)

So a verbal contemporaneous agreement cannot establish that a sum certain, payable sixty days after date, was to be paid in ten equal instalments, at various dates.(*t*)

And, in general, parol evidence cannot alter or vary the period of a note's maturity, so as to make it payable at any different time from that which it absolutely imports.(*u*) Indeed, a promise to pay a sum certain on demand with interest, adding the words, "but no demand is to be made as long as the interest

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(*o*) Free *v.* Hawkins, 8 Taunt. 92, Holt, N. P. 550, 1 J. B. Moore, 535.

(*p*) Woodbridge *v.* Spooner, 3 B. & Ald. 233; Graves *v.* Clark, 6 Blackf. 183.

(*q*) Dawson *v.* Bank of Illinois, 4 Scam. 56.

(*r*) Hill *v.* Gaw, 4 Barr, 493.

(*s*) McClanaghan *v.* Hines, 2 Strobh. 122.

(*t*) Barton *v.* Wilkins, 1 Misso. 74. Nor can parol show that the maker while writing the note payable in one year, requested that the time should be two years, and the payee, although refusing to have the note so written, promised to wait two years. Eaton *v.* Emerson, 14 Maine, 335.

(*u*) Sice *v.* Cunningham, 1 Cowen, 397; Bishop *v.* Dexter, 2 Conn. 419; Joyner *v.* Turner, 19 Ark. 690; Nicholas *v.* Krebs, 11 Ala. 230. And as a note with no time expressed is by construction of law payable on demand, therefore, no agreement for a credit or of a specified time of payment can be shown. Thompson *v.* Ketchum, 8 Johns. 189. And a plea of parol agreement to wait for payment until receipt of a draft from New Orleans, is no answer to a suit on a note now due upon its terms. Kincaid *v.* Higgins, 1 Bibb, 396.

is paid," would be no promissory note.(*v*) Still less, therefore, would courts be inclined to render judgment on a note that was perfect, complete, and unqualified as such, deducting such damages as may be alleged to have resulted from the breach of an oral contract concerning the same debt, alleged by one of the parties to have been entered into at the giving of the note.

So a contemporaneous oral agreement between indorsee and maker that the money shall not be demanded at the maturity of the note, does not excuse a delay of the demand in order to charge the indorser, especially where the indorser is not a party to the agreement.(*w*)

3. *Of such Agreements as to the Amount.*

Against a note for money advanced by one partner to another, after dissolution, evidence of a contemporaneous verbal agreement that the note should be paid as far as possible by the firm's effects, and the balance paid, three fourths by the lender, and one fourth by the maker, is inadmissible.(*x*)

A mere oral agreement between parties, to receive a less sum for a note of a larger sum, agreed to be due, is void.(*y*) So is an agreement that the value of certain peltries should be credited on the note, when the amount should be ascertained.(*z*) It has even been held that parol evidence cannot show a mistake in the sum of a note, by positive proof that the agreed price of the goods for which it was given was less than that sum.(*a*)

It is no defence to the maker, that the payee, in consequence of the former's insolvency, had sold the note to the plaintiff for much less than its face, upon a verbal condition that the vendee would exact of the maker only about as much as he gave for it.(*b*)

A note expressed to be given for a lot of wheat containing 105 acres, at a fixed price per acre, cannot be qualified by an alleged oral condition made at the time, that the wheat should

(*v*) Seacord *v.* Burling, 5 Denio, 444.
(*w*) Sice *v.* Cunningham, 1 Cowen, 397.
(*x*) Gridley *v.* Dole, 4 Comst. 486.
(*y*) Western Bank *v.* Kyle, 6 Gill, 343.
(*z*) Featherston *v.* Wilson, 4 Ark. 154.
(*a*) Downs *v.* Webster, Brayt. 79.
(*b*) Babson *v.* Webber, 9 Pick. 163.

be afterwards measured, and the sum in the note vary as the acres should vary from 105.(*c*) Such an agreement cannot prove, in the case of a note given for the hire of a negro, that an additional sum was to be paid, if cotton should bear a certain increased price.(*d*)

Parol evidence cannot prove an oral contemporaneous condition which might reduce a specific sum payable in the note to one half, or extinguish it altogether.(*e*)

4. *Of such Agreements as to the Manner of Payment.*

A verbal understanding between the acceptor and payee of a bill that it should be paid out of a particular fund, does not control the legal operation of the bill; as, that payment should not be demanded in the event of plaintiff being unable to reimburse himself out of the effects of A, whose agent he was.(*f*)

So evidence cannot show that an absolute note given to assignees in bankruptcy by the bankrupt, was to be paid out of the latter's allowance as far as it went, and the residue by the defendant in case only the allowance should be insufficient.(*g*)

Parol evidence cannot alter a note payable in "current bank-notes of Cincinnati," since the terms are not ambiguous.(*h*) Nor can it prove that in a note payable in "lawful money," lawful silver money was meant.(*i*) Nor that bills payable in cash were to be payable in paper money.(*j*) Nor that an account which the maker held against the payee should be deducted from the note.(*k*) But an agreement after giving the note, to have it payable in a debt contemplated by the payee with a third person, has been held valid, and, when the debt is contracted, was permitted to be shown in payment.(*l*)

From a note payable in "good, well-finished ploughs," a contemporaneous verbal agreement, that if there should be

(*c*) Carter *v.* Hamilton, 11 Barb. 147.
(*d*) Gazoway *v.* Moore, Harper, 401.
(*e*) Beard *v.* White, 1 Ala. 436, 5 Port. Ala. 94.
(*f*) Campbell *v.* Hodgson, Gow, 74.
(*g*) Rawson *v.* Walker, 1 Stark. 361.
(*h*) Morris *v.* Edwards, 1 Ohio, 189.
(*i*) Alsop *v.* Goodwin, 1 Root, 196.
(*j*) M'Minn *v.* Owen, 2 Dallas, 173.
(*k*) Eaves *v.* Henderson, 17 Wend. 190.
(*l*) Ibid.

improvements in the pattern, the plaintiff should have the improved ploughs, is rightfully excluded.(*m*)

Parol evidence of a contemporaneous agreement that a note in the usual form was intended to stand in place of a receipt, and that the sum for which it was given was intended as payment of a prior debt of the defendant's father, is not admissible.(*n*)

In Missouri, it has been held that the maker of a note payable "in the currency of the State" cannot show by parol testimony an intent of the parties to pay anything but gold and silver, or notes of the Missouri Bank.(*o*)

A contemporaneous verbal contract cannot prove that the note was to be paid in particular notes of a specified bank; (*p*) or that in general any current bank-notes should be received instead of money; (*q*) or that notes of a certain railroad company were to be taken in payment; (*r*) or that, being payable in "the notes of one of the chartered banks of Mississippi at par," a certain kind of funds was meant; for there is no ambiguity in the note; (*s*) or that a note payable in dollars was to be paid in "commonwealth's paper"; (*t*) or that it was not payable in money, but in goods.(*u*)

Parol evidence of an oral contract made with the note, that it should be paid in lumber, when by its terms it is payable in money, is inadmissible. Hence, also, a contract having for its only consideration the release of the signers from such a verbal agreement, is void for want of consideration.(*v*) It is no de-

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(*m*) Gilman *v.* Moore, 14 Vt. 457.

(*n*) Billings *v.* Billings, 10 Cush. 178.

(*o*) Cockrill *v.* Kirkpatrick, 9 Misso. 688.

(*p*) Cole *v.* Hundley, 8 Smedes & M. 473. This was a case in chancery, the rule being the same there, as to the rejection of oral testimony varying notes and bills, as at law.

(*q*) Noe *v.* Hodges, 3 Humph. 162.

(*r*) Hair *v.* La Bronse, 10 Ala. 548.

(*s*) Smith *v.* Elder, 7 Smedes & M. 507.

(*t*) Williams *v.* Beazley, 3 J. J. Marsh. 577; Baugh *v.* Ramsey, 4 T. B. Mon. 155. So it cannot be shown that a check purporting on its face to be for so much money, was really payable only in the notes of a depreciated bank. Pack *v.* Thomas, 13 Smedes & M. 11.

(*u*) Bradley *v.* Anderson, 5 Vt. 152.

(*v*) Lang *v.* Johnson, 4 Foster, 302. The promisors, in this case, having afterwards, in consideration that the payee agreed to release them from the oral agreement

fence that, by such an agreement, the note was to be paid, contrary to its tenor, out of certain funds; and that the plaintiff should be compelled to apply the first money coming to his hands from the defendant, to the payment of the note.(*w*)

Against an absolute note the maker cannot bring the oral agreement of the payees that such sum as should be found justly due from them to the maker should be applied in satisfaction of the note.(*x*) Nor can an understanding of the parties that one indorser should be bound as maker, be introduced by parol in suing the note.(*y*)

In a note containing no place of payment, parol evidence has been rejected showing an intention to make it payable in a particular place, other than that of the making.(*z*)

5. *Of such Agreements as to Payment on a Contingency.*

The maker of an absolute note cannot show against the payee, and, *a fortiori*, not against any indorsee, an oral contemporaneous agreement which makes the note payable only on a contingency. Thus, evidence is rejected that the note was to be demanded only on notice of non-payment of a third party's debt to the plaintiff; (*a*) or that it was not to be paid until plaintiff had paid a certain rent agreed upon; (*b*) or that at a settlement of the accounts of maker and payee, upon which the note was given, the plaintiff agreed to give it up, unless he could find a receipt of payment for some property which defendant had let him have, the parties differing as to whether the property had been paid for.(*c*)

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to pay a note in lumber, made a further verbal agreement to pay him certain extra interest, this second oral contract was without consideration and void.

(*w*) Hoyt *v.* French, 4 Foster, 198.

(*x*) St. Louis Perpetual Ins. Co. *v.* Homer, 9 Met. 39.

(*y*) Anderson *v.* Yell, 15 Ark. 9.

(*z*) Pierce *v.* Whitney, 29 Maine, 188; Moore *v.* Davidson, 18 Ala. 209. Nor can the maker of a note show against the payee, that a guaranty indorsed upon the note was at the time it was made accepted by the payee in full satisfaction of the note. Smith *v.* Stevens, 3 Ind. 332. And in an action to a joint and several note to defendant and A, and a plea of release under seal to A, a replication that it was issued at defendant's request, who, in consideration of the release, promised to remain liable on the note, was held to be bad; the principal reason being that it set up a parol exception to a release under seal. Brooks *v.* Stuart, 9 A. & E. 854.

(*a*) Brown *v.* Langley, 5 Scott, N. R. 249, 4 Man. & G. 466.

(*b*) Moseley *v.* Hanford, 10 B. & C. 729.

(*c*) Brown *v.* Hull, 1 Denio, 400.

So it cannot be shown that notes were to be void, if certain bills of a third party on a separate transaction should be paid upon maturity; (*d*) nor that an indorsement absolute was conditioned on the maker's having certain accounts in the indorser's hands, sufficient to satisfy the note; (*e*) nor that the payee orally agreed to save the maker from any loss incurred by re-vending the property for which the note was given.(*f*)

In an indorsement made to a bank, an oral agreement made by the president at the time, that the indorser should never be bound, could not vary the legal effect of the indorsement. And, indeed, a written agreement of the same purport would be held void, as a fraud.(*g*)

It cannot be shown that an absolute acceptance was conditioned orally upon the drawer's finishing certain work undertaken for the drawee.(*h*) Or that a note was payable only in case the sale of a lot of land was suspended.(*i*) So, an oral contingency that certain previous notes of the defendant should be procured and sent to him, cannot control an unconditional note.(*j*)

The maker of a note in the usual form cannot plead an oral contract of the payee, at the making, that, upon receiving a deed of real estate from the defendant, he would give the note up, and that the entire arrangement was to secure all parties during some delay desired mutually. The written promise was absolute and indefeasible, the parol agreement would make it conditional and defeasible.(*k*)

If the assignee of an insolvent give his own unconditional note in full payment of a creditor's account, he cannot, against a suit brought upon the note, urge a verbal agreement at the time that he should not be bound to pay the whole unless the estate in his hands proved sufficient.(*l*)

A mutual understanding of the parties at the time the note

(*d*) Penny *v.* Graves, 12 Ill. 287.
(*e*) Holt *v.* Moore, 5 Ala. 521.
(*f*) Harris *v.* Caston, 2 Bailey, 342.
(*g*) Loomis *v.* Fay, 24 Vt. 240.
(*h*) Heaverin *v.* Donnell, 7 Smedes & M. 244.
(*i*) Calhoun *v.* Davis, 2 Ind. 532.
(*j*) Goddard *v.* Cutts, 11 Maine, 440.
(*k*) Spring *v.* Lovett, 11 Pick. 417.
(*l*) Adams *v.* Wilson, 12 Met. 138.

was given that, if the value of the goods sold should turn out less than supposed, the note should be void, is no defence.(*m*) And parol cannot show that it was part of the contract of sale for which the note was given, that, in certain contingencies, as that, if the defendant having made all reasonable exertions to pay the note at maturity, were unable to do so; or could not pay it without sacrificing property; then the contract expressed in the note was to be modified; e. g. as by taking goods for a debt payable in money, or giving a further time of payment, whether definite or indefinite.(*n*) So it is with an oral condition that the note should be given up on the giving of another note with surety; (*o*) or that in an ordinary written promise to assign a third party's note, it was orally agreed to make an assignment without recourse; (*p*) or that an absolute note on time should not be payable until the defendant should sell a specified amount of a certain drug; (*q*) or that a note given for an unsound horse should not be paid unless the horse got well.(*r*)

A contemporaneous oral bargain of the plaintiff to sue the note as soon as it was payable, and that otherwise the defendant should not be held, is inadmissible.(*s*)

The deposition of a witness that he, as the plaintiff's agent, had, at the time of giving the note, drawn an agreement of the parties, making the note payable on a certain condition, which had failed, is no defence, if the note is explicit in terms and free from all ambiguity.(*t*) An oral agreement that the defendant, a surety, liable as joint and several promisor, was only to be called

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(*m*) Sears *v.* Wright, 24 Maine, 278. The note was given for logs, and the defendant sought to prove by parol an understanding that the note was not to be paid, if on manufacturing the logs into boards, the result to him should be a loss.

(*n*) Cox *v.* Wallace, 5 Blackf. 199. An oral agreement that the maker should be exonerated if the note should be sent to Bank A. is no defence. Montgomery R. R. Co. *v.* Hurst, 9 Ala. 513.

(*o*) Burge *v.* Dishman, 5 Blackf. 272.

(*p*) Odam *v.* Beard, 1 Blackf. 191; Blair *v.* Williams, 7 id. 132. A parol agreement contemporaneous with a bond conveying land and notes given in payment thereof, cannot vary the bond and notes. Lane *v.* Sharpe, 3 Scam. 566.

(*q*) Harlow *v.* Boswell, 15 Ill. 56.

(*r*) Columbia *v.* Amos, 5 Ind. 184.

(*s*) Hanchet *v.* Birge, 12 Met. 545.

(*t*) Rose *v.* Learned, 14 Mass. 154.

upon in the event of a final loss occasioned by the inability of his principal.(*u*)

If oral bargains alleged to have been made with the note are relied upon as a defence, on the ground that the funds have been or are to be diverted from their intended objects, those bargains are wholly inadmissible. Thus, to an unconditional note in aid of an institution of learning, parol seems inadmissible to show that the money was to have been applied exclusively to one object, as to one branch of learning. For the moving considerations to its execution cannot be shown orally, when the objects and considerations are various, and none is expressed in the note.(*v*)

A parol agreement cannot show that a note was not to be paid until a certain account should be adjusted and the amount credited on the face; (*w*) or only on a contingency provided for by a written contract, independent of the note, and not referred to in it, although the alleged contract was made by the parties for the purpose of governing all sales like the one for which the present note was given.(*x*)

Nor can it be shown that the defendant was not to be liable, unless and until he should be able to collect a third party's note.(*y*) And if a note be given for the payee's interest in the estate of a deceased, it cannot be shown in defence that the maker and payee agreed that it should be void unless all the other heirs would come into the settlement.(*z*) For a similar reason, it is no defence to a note purporting to be absolute, that it was agreed to be void if the debt for which it was given should be found in the inventory already made by one of the

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(*u*) Hunt *v.* Adams, 7 Mass. 518. But where the question arose on a bar by the statute of limitations, parol evidence was allowed to show who was principal and who surety, in a note joint and several on its face. Lewis *v.* Harbin, 5 B. Mon. 564; Emmons *v.* Overton, 18 id. 643.

(*v*) Craig *v.* Baptist Educational Soc., 7 B. Mon. 73. It cannot be shown that an indorsement "April, 1789, £15," was merely a duplicate of a receipt running "June 23d, Rec'd £15 11s." Herd *v.* Bissel, 1 Root, 260.

(*w*) Mahan *v.* Sherman, 7 Blackf. 378.

(*x*) Miller *v.* White, 7 Blackf. 491.

(*y*) Underwood *v.* Simonds, 12 Met. 275.

(*z*) Ely *v.* Kilborn, 5 Denio, 514. Here the note and release formed a written agreement, and each was a good consideration of the other, although the defendant's object was not effected. Hence the failure of the condition in the parol agreement was no failure of the condition of either note or release.

promisors, in a petition for his discharge in insolvency.(*a*) Nor is a plea sustainable, that the note was given for a legal fee, with a contemporaneous verbal agreement that, if the parties compromised, the debt should not be paid, and that they did so compromise.(*b*)

An alleged verbal contemporaneous contract cannot show that a renewal, written on a note and appearing to be absolute, was in fact only conditional.(*c*) Nor that a note absolute in terms was not to be paid unless called for during the lifetime of the payee.(*d*) Nor that an unconditional check should not be paid until certain other bills of third parties were paid.(*e*)

Parol proof is inadmissible to show that a note payable on a day certain was not, by contemporaneous agreement, to be paid at all, unless the payees, attorneys at law, were successful in the suit for the bringing of which it was given.(*f*) So parol evidence that the principal should not be called for so long as the interest continued to be paid punctually, is not admissible.(*g*)

And where the written bargain contains a stipulation for a certain term of credit, parol evidence cannot be received to show that this stipulation was provisional, and dependent upon the continued solvency of the defendant.(*h*) And if the note be in its terms absolute, it cannot be affected by showing that it was

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(*a*) Erwin *v.* Saunders, 1 Cowen, 249. The case of Payne *v.* Ladue, 1 Hill, 116, was similar, where the consideration of the note was, that the payee should give up certain notes, discontinue certain suits, and sign a retraction of an alleged slander; and on his failure to do these things, the note was to be void. The payee gave up the notes and the suit, but did not sign the retraction; yet his parol agreement to do so could not contradict the absolute note. If the retraction had been the sole consideration for the note, the oral agreement to retract had been a good defence on the ground of want of consideration. But where only part of the consideration fails, an action on the agreement is the only just remedy, and the terms of the note cannot be changed.

(*b*) Dale *v.* Pope, 4 Littell, 166. This was a bill in equity, praying relief against a similar judgment at law.

(*c*) Warren Academy *v.* Starrett, 15 Maine, 443.

(*d*) Boody *v.* McKenney, 23 Maine, 517.

(*e*) Dunning *v.* Pratt, 4 Duer, 331. "The rule excluding the evidence rests upon other and different grounds than the actual equities between the parties; it is a rule of policy, and is enforced often against the justice of the case in the particular instance." Ibid.

(*f*) West *v.* Kelly, 19 Ala. 353.

(*g*) Trustees, &c. in Hanson *v.* Stetson, 5 Pick. 506.

(*h*) Heywood *v.* Perrin, 10 Pick. 228.

given in payment for goods bought, and that the sale itself was conditional.(*i*) If the consideration be stated at the foot of the note, and the statement be signed by the witnesses of the note, and, in its terms, it purports to be absolute, it cannot be so explained as to make either the consideration or the note conditional.(*j*)

So, a contemporaneous parol agreement to a note payable in instalments, that, if the maker should fail to meet the first instalment when due, the whole note should be due, is not admissible.(*k*) Or that it was not payable before the defendant should make the money from the products of certain morus multicaulis buds, for which the note was executed.(*l*) Or not until the debt of a third party was collected.(*m*) A contemporaneous verbal agreement cannot be set up to postpone payment of an absolute bill until after the decision of the plaintiff's lawsuit with a third party.(*n*) Nor, if the note be payable so many months after date, for value received, in consideration of the payee's agreement to perform certain services as attorney at law for the maker, and no time is fixed for the performance of the services, can oral testimony prove that the note was not to be due till the contemplated services were rendered.(*o*)

(*i*) Barney *v.* Bliss, 2 Aikens, 60; Noyes *v.* Evans, 6 Vt. 628; Bentley *v.* Bradley, 8 id. 243; Reed *v.* Wood, 9 id. 285; Isaacs *v.* Elkins, 11 id. 679. Hence, a contemporaneous parol agreement that the defendant might elect whether to pay the note or return the article for which it was given, within a given time, is no defence. Bentley *v.* Bradley. Isaacs *v.* Elkins, *supra*. Nor can a parol warranty be proved in defence of a sale and note, describing the property sold, and receipting the price, but giving no warranty. Reed *v.* Wood, *supra*.

(*j*) Converse *v.* Moulton, 2 Root, 195.

(*k*) Blakemore *v.* Wood, 3 Sneed, 470.

(*l*) Campbell *v.* Upshaw, 7 Humph. 185.

(*m*) Litchfield *v.* Falconer, 2 Ala. 280; Harvey *v.* Laflin, 2 Ind. 477.

(*n*) Adams *v.* Wordley, 1 M. & W. 374, Tyr. & Gr. 620. Assumpsit by the drawer against the acceptor of two bills of exchange. The plea was an oral agreement, upon the making of the bills, that the defendant should be discharged from all liability in an action then pending against him by the plaintiff on a promissory note, on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question, in case the plaintiff should recover in another action against C. on a note like the defendant's; but until such recovery he should not ask for payment of the present bills. And the defendant had paid the costs, and the money, and accepted the bills, and the suit with C. was still undetermined. This plea was held bad, on demurrer.

(*o*) Walker *v.* Clay, 21 Ala. 797.

6. *Of such Agreements as supply Defects or correct Errors in a Bill or Note.*

Though parol evidence cannot be admitted to affect a note which is absolute and complete in its terms, yet if the instrument obviously and certainly contains only a part of the contract of the parties, the remainder may be supplied orally, so that the entire stipulation may be adjusted. This is not constructing a new bargain, but authenticating and throwing light upon the old.

Parol evidence may show the place where payment was agreed to be demanded, when it does not appear on the face of the note. Such an agreement is a circumstance extrinsic to the contract made by the note.(*p*)

The written date of a note may be varied by parol, since that does not ordinarily form a part of the contract, so as to be essential to its validity, and a note may be ante-dated or post-dated in the absence of statutory prohibition.(*q*) And an indorsee has been allowed to prove against the maker a mistake in the date of a note, though by such proof payment was extended so as to cut off a defence good in a suit by the payee.(*r*)

The rule seems to have been frequently applied, that an accidental mistake in executing or copying a note or bill, whereby it fails to speak the intent of the parties, may be rectified at law by parol evidence, where, at least, the mistake is apparent on the face. In such cases of clerical mistake, at all events, the instrument may be reformed in equity.(*s*) It must, however, be remembered, that generally, an absolute note can no more be varied by parol evidence in equity than at law.(*t*)

(*p*) Pearson *v.* Bank of the Metropolis, 1 Pet. 89.

(*q*) Dean *v.* De Lezardi, 24 Missis. 424; Aldridge *v.* Branch Bank, 17 Ala. 45. The object, in the latter case, was to prevent a note dated Sunday from being pronounced illegal. So where the statute has made a certain species of notes made after a fixed day, void, it is competent for the promisor of the note in suit to prove that it was made after the day, though the written date is before. Bayley *v.* Taber, 5 Mass. 286.

(*r*) Drake *v.* Rogers, 32 Maine, 524. The maker of a note payable at a specified length of time after its date, in an action brought by an indorsee, who obtained it for value before its apparent pay-day, and without knowledge of any mistake in its date, is not allowed, in order to prove the action prematurely brought, to prove that the note bore a date earlier than the day on which it was made. **Huston** *v.* Young, 33 Maine, 85.

(*s*) Paysant *v.* Ware, 1 Ala. 160.

(*t*) See *supra*, p. 502, note *d*.

The plaintiff may of course prove by parol that the note was executed to him by a wrong name, and that it is his note,(*u*) and the defendant may show that it was given for too large a sum by error in computation.(*v*)

Ordinarily, the law rejecting parol evidence offered in variance of notes and bills, applies to joint and several notes, and to the relation of principal and surety. Therefore, when the maker of a note (*w*) who has signed it as surety only, does not appear on the face of the paper to be a surety, he is a principal with respect to everybody who has no notice of his real character. But a maker may show an oral agreement to be bound as surety only, and that the agreement was known to the plaintiff; and these facts proved will enure as a defence against the principal liability.(*x*)

But the plaintiff's knowledge of the relation of suretyship has been considered to operate rather as an estoppel upon him, than as any exception to the rule concerning the grades of evidence. The law respecting sureties and their obligations is enforced as a legal liability growing out of the mutual relation.(*y*) Hence, as

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(*u*) Jester *v.* Hopper, 13 Ark. 43. Hopper's name was spelt Harper.

(*v*) Seeley *v.* Engell, 3 Kern. 542. Some early cases, however, through fear of infringing on the rules of evidence, refused to allow parol to support any plea of mistake, to alter the terms of a note. Thus a plea that the note was by mistake originally made too large was held inadmissible in McDuffie *v.* Magoon, 26 Vt. 518. So with a plea that the interest was reckoned from one time, when it should have been from another. Id. Or that it was payable in January, 1811, instead of January, 1810. Fitzhugh *v.* Runyon, 8 Johns. 375. And in one case of a note running, "I promise to pay A. B. Sixteen, on the first day of May next." The plaintiff's testimony that sixteen meant sixteen dollars was excluded on the ground of patent ambiguity, and he was forced to an action on the original contract. Brown *v.* Bebee, 1 D. Chip. 227.

(*w*) In like manner, the question whether a person is principal or surety in a grant of annuity is to be determined on the terms of the instruments; and no extraneous evidence is admissible for that purpose. Hollier *v.* Eyre, 9 Clark & F. 1, 45.

(*x*) Fentum *v.* Pocock, 5 Taunt. 192, 1 Marsh. 14; Manley *v.* Boycot, 2 Ellis & B. 46; Bank of Ireland *v.* Beresford, 6 Dow, 233; Strong *v.* Foster, 17 C. B. 201; Wells *v.* Girling, 8 Taunt. 737; M'Gee *v.* Prouty, 9 Met. 547; Weston *v.* Chamberlain, 7 Cush. 404; Townsend *v.* Riddle, 2 N. H. 448; Grafton Bank *v.* Kent, 4 id. 221; Nichols *v.* Parsons, 6 id. 30; Miles *v.* O'Hara, 1 S. & R. 32; Warner *v.* Price, 3 Wend. 397; Lapham *v.* Barnes, 2 Vt. 213; Harris *v.* Brooks, 21 Pick. 195; Kelley *v.* Few, 18 Ohio, 441.

(*y*) M'Gee *v.* Prouty, 9 Met. 547, per *Hubbard*, J. Here A, B, C, and D signed a promissory note, and the word "surety" was added to the names of C and D only. D paid the note, and sued A and B jointly, to recover the amount paid by him. Held, that B might prove by parol that he signed as surety for A, and that upon such proof, D

between the sureties themselves, and as to all parties who contracted with knowledge of the relation, suretyship may be shown. But it may not against indorsees without knowledge and for value. The case is similar to the rule permitting the maker to show that he signed purely for the payee's accommodation, when the latter sues on his note.

It has been repeatedly held, as we have shown in a preceding chapter, that an indorser may, in some cases, by express declarations and oral agreement, waive his right to demand and notice, and this verbal contract may be set up against his defence on that ground.(*z*) But parol cannot show that a payee, who writes his name as indorser, was really a guarantor, adducing the oral agreement to prove a waiver of demand and notice.(*a*)

7. *Of such Agreement in Explanation of a Bill or Note.*

If in some cases the equity arising from the particular circumstances, would seem to oppose this exclusion of evidence, which would enable the law to carry into effect the intentions of the parties, in others, and it is believed, in the great majority of cases, an admission of the testimony would defeat the true equity of the case.(*b*) And hence this rule of exclusion is seldom relaxed, excepting in obedience to the familiar principle, which needs no

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could not maintain such joint action, although D, when he signed the note, did not know that B was surety for A.

(*z*) Boyd *v.* Cleveland, 4 Pick. 525; Phipson *v.* Kneller, 4 Camp. 285, 1 Stark. 116; Taunton Bank *v.* Richardson, 5 Pick. 436; Union Bank *v.* Hyde, 6 Wheat. 572; Fuller *v.* McDonald, 8 Greenl. 213; State Bank *v.* Hurd, 12 Mass. 171; Agan *v.* M'Manus, 11 Johns. 180; Lane *v.* Steward, 20 Maine, 98; Sanborn *v.* Southard, 25 id. 409; Leffingwell *v.* White, 1 Johns. Cas. 99; Fullerton *v.* Rundlett, 27 Maine, 31; Whitney *v.* Abbot, 5 N. H. 378; Edwards *v.* Tandy, 36 id. 540; Field *v.* Nickerson, 13 Mass. 131, 138; Lary *v.* Young, 13 Ark. 401.

(*a*) Boyd *v.* Cleveland, 4 Pick. 525; Fuller *v.* McDonald, 8 Greenl. 213; and other cases cited in preceding note. Sufficient evidence of waiver may be the known usage of banks, which an indorser will be held to have impliedly agreed to. Widgery *v.* Munroe, 6 Mass. 449; Jones *v.* Fales, 4 id. 245; Lincoln & Kennebeck Bank *v.* Page, 9 Mass. 155; Lincoln & Kennebeck Bank *v.* Hammatt, id. 159; Renner *v.* Bank of Columbia, 9 Wheat. 581; Bank of Albion *v.* Smith, 27 Barb. 489; Pearson *v.* Bank of the Metropolis, 1 Pet. 89. But the indorser must be conusant of a local usage set up. Peirce *v.* Butler, 14 Mass. 303. And see Rand's note *a* to Jones *v.* Fales, *supra*, with the numerous cases there cited. A written agreement by the defendant, an indorser, to dispense with demand and notice, may *a fortiori* be introduced to overthrow a defence on these grounds against the suit. Duvall *v.* Farmers' Bank, 7 Gill & J. 44, 9 id. 31.

(*b*) Dwight *v.* Pomeroy, 17 Mass 303 329.

citation of adjudicated cases to support it, that where the language of a note is capable of two meanings, parol evidence may direct the proper choice to be made between them. But here there is evidently no new bargain set up, but an attempt to discover the original. And, speaking generally, a parol contract collateral to a note, and not contradictory of it, may be proved by parol.(*c*)

A note for "125 dollars, Texas money, at its current price at New Orleans," has been held ambiguous, and therefore subject to oral commentary.(*d*) And the rule refusing to admit evidence of an oral bargain does not exclude evidence of usage or custom in explaining the terms of a note or bill already written and signed.(*e*)

In replevin for property mortgaged to secure payment of a note, parol evidence may show an agreement at making the note for extra interest, and that all payments were to be applied to such interest. The evidence does not modify the contract, but merely shows an intended application of payments to an independent transaction.(*f*)

A memorandum condition on a note, is a part of it, and therefore may be explained by parol, if ambiguous, as by the omission of one or more words for the sake of terseness.(*g*) So parol evidence may show that C, signing his name as "surety" under both A and B, is holden as surety for both.(*h*) On the same

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(*c*) Phillips *v.* Preston, 5 How. 278, with the review of the cases there taken. The contract adjudicated was that of two indorsers, to divide any loss between them.

(*d*) Roberts *v* Short, 1 Texas, 373. "The history," said the court, "of the currency of Texas for the last seven or eight years will forbid the conclusion that the parties meant by *Texas money* gold or silver." A note in "current bank-notes of Cincinnatti," is not ambiguous, and not to be altered by parol. Morris *v.* Edwards, 1 Ohio, 189.

(*e*) "There is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract." Renner *v.* Bank of Columbia, 9 Wheat. 581, 587.

(*f*) Rohan *v.* Hanson, 11 Cush. 44.

(*g*) Swan *v.* Cox, 1 C. Marsh. 176; Lockhard *v.* Avery, 8 Ala. 502; Agawam Bank *v.* Strever, 18 N. Y. 502.

(*h*) Sisson *v.* Barrett, 2 Comst. 406, 6 Barb. 199.

ground, where it is doubtful whether a party signed as principal or surety, having put "agent" to his name, parol evidence may show his intent.(*i*) In a note signed by certain parties with these words "Trustees, &c.," appended to the signatures, it has been held, but as we think with some relaxation of the law of evidence, that one side may show orally that the defendants agreed to be bound as principals, and the other, that it was as agents only.(*j*)

In the absence of any stipulation in a note given for the hire of a slave, parol may show an oral contemporaneous agreement how the slave was to be employed.(*k*) This is another illustration of the rule already stated, that collateral oral contracts on the same subject-matter with that of the note, and independent of it, may be shown in suit. Parol may show that the note in suit was "the within note" mentioned in an assignment made upon a separate paper indorsing a note; (*l*) and in general may prove the identity of a note.(*m*)

The general rule is, that parol may show the circumstances under which the bill is signed, and whether for accommodation, or as surety, or guarantor, or joint maker, &c., when it does not go to change the legal import of the signature. Under this rule, it has been decided that an indorsement may be orally shown to be a mere authority to collect.(*n*) And that a note signed by one of a firm individually was given for a partnership transaction.(*o*)

(*i*) Dessau *v.* Bours, 1 McAllister, C. C. 20; Heckscher *v.* Binney, 3 Woodb. & M. 333. By the general commercial law, a note payable to "A, agent," must be sued by A. But in Vermont, in a note payable in these terms, "to A, treasurer, &c." the company of which A was treasurer may show by parol that they gave the consideration and owned the note, and thus sustain an action brought in their own name. Arlington *v.* Hinds, 1 D. Chip. 431; Rutland, &c. R. Co. *v.* Cole, 24 Vt. 33.

(*j*) Cleaveland *v.* Stewart, 3 Ga. 283. So, against a party indorsing a note before delivery to the promisee, the latter having written his name above the defendant's, for purposes of negotiation, and then erased it on receiving the note back from the indorsee, parol evidence may be introduced by the promisee of the circumstances under which he had written and erased his name, showing his intent not to make the defendant in place of original promisor, merely a second indorser. Austin *v.* Boyd, 24 Pick. 64.

(*k*) Western *v.* Pollard, 16 B. Mon. 315; Richardson *v.* Dingle, 11 Rich. Law, 405; Knight *v.* Knotts, 8 id. 35. So of a horse. Jeffery *v.* Walton, 1 Stark. 267.

(*l*) Thornton *v.* Crowther, 24 Misso. 164.

(*m*) Eckel *v.* Jones, 8 Barr, 501.

(*n*) Barker *v.* Prentiss, 6 Mass. 430, 434.

(*o*) See Van Reimsdyk *v.* Kane, 1 Gallis. 630, 640.

But the principles already laid down would seem to establish imperatively, that the maker of a note cannot show that he signed only as a third party's agent, when nothing on the note indicates that qualified liability, and the note is otherwise good.(*p*)

We have already stated that the legal effect of an indorsement cannot ordinarily be varied by parol evidence; as, for instance, that, being put directly under the payee's name, it was merely a guaranty of the payee's identity.(*q*) But it is otherwise, it seems, in most of the States, with indorsements in blank. It has been broadly stated, that the reasons which forbid the admission of parol to alter instruments do not apply to contracts raised by operation of law, such as that which the law implies in respect to the indorser of a note of hand.(*r*) Hence it has been held, that, though a party who indorses a note before it is due is presumed by the law to be a guarantor, this liability may be controlled by oral proof of an actual agreement other than that which the law usually implies.(*s*) The ground of these decisions is, that a blank indorsement not filled up is not a written instrument, and hence not entitled to its immunities, nor subjected to its restraints. It furnishes presumptive evidence of authority to fill up the blank in any way; but, being presumptive only, it leaves the indorser the liberty of proving an express stipulation to have the blank filled

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(*p*) Stackpole *v.* Arnold, 11 Mass. 27; Hancock *v.* Fairfield, 30 Maine, 299; Hiatt *v.* Simpson, 8 Ind. 256. And so one of two absolute makers cannot show that he was to be bound on the note only in case the payee could not get the amount from the other. Jones *v.* Jeffries, 17 Misso. 577; Terrel *v.* Townsend, 6 Texas, 149. But joint and several promisors who are in fact sureties, may show this, when a payee, ignorant of their true relation, proposes to give time to the actual principal, to their injury. Mariners' Bank *v.* Abbott, 28 Maine, 280.

(*q*) Prescott Bank *v.* Caverly, 7 Gray, 217.

(*r*) Susquehanna Bridge, &c. Co. *v.* Evans, 4 Wash. C. C. 480, per *Washington*, J.

(*s*) Smith *v.* Barber, 1 Root, 207; Camden *v.* McKoy, 3 Scam. 437; Cushman *v.* Dement, id. 497; Carroll *v.* Weld, 13 Ill. 682; Hill *v.* Ely, 5 S. & R. 363; Dean *v.* Hall, 17 Wend 214, 221; Ellis *v.* Brown, 6 Barb 282; Crozer *v.* Chambers, Spencer, 256; Johnson *v.* Martinus, 4 Halst. 144; Watkins *v.* Kirkpatrick, 2 Dutch. 84; Case *v.* Spalding, 24 Conn. 578; Friend *v.* Beebe, 3 Greene, Iowa, 279; Brewster *v.* Dana, 1 Root, 266; Barker *v.* Prentiss, 6 Mass. 430; Bireleback *v.* Wilkins, 22 Penn. State, 26; Perkins *v.* Catlin, 11 Conn. 213; Castle *v.* Candee, 16 Conn. 223; Newell *v.* Williams, 5 Sneed, 208; Riley *v.* Gerrish, 9 Cush. 104; Wells *v.* Jackson, 6 Blackf. 40; Early *v.* Foster, 7 id. 35; Harris *v.* Pierce, 6 Ind. 162 In some courts, in the case of an indorsement in blank, if the plaintiff abandon the contract implied by law from the indorsement, and seek to fix a liability by special contract, he must fill up the indorsement before trial with the agreement on which he intends to rely Castle *v.* Candee, 16 Conn. 223.

up in a particular way. Hence, though an indorser in blank in legal contemplation writes just what the law presumes he intended to write, still the legal inference does not preclude the parties from proving what their real contract was. In this view, the real contract does not contradict, but explains with precision the written agreement, and is consistent therewith. And hence a blank indorsement may be orally proved to have been made merely for the purpose of collection, or as a renewal of a previous note. And in general, the payee, in suing one who indorsed a note in blank at the time it was given, may show by parol the real nature of the transaction. For, in a suit between the original parties, it is considered that the blank name means nothing of itself, and its purpose must be shown *aliunde*.(*t*)

On the other hand, in some of the States, and especially in New York, the indorser in blank of a promissory note makes a full legal indorsement, and the contract cannot be turned into a guaranty, or any other or different contract whatsoever, either by construction of law, or by proof of extrinsic facts. The earlier decisions in New York, and those of most of the other States, are not followed there now.(*u*) This rule puts all indorsements on the same footing. The ground is, that, if an indorser do not choose to fix his own liability, the court will fix it for him. And since the contract evidenced by a blank indorsement is ascertained

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(*t*) Riley *v.* Gerrish, 9 Cush. 104; Union Bank *v.* Willis, 8 Met. 504; Austin *v.* Boyd, 24 Pick. 64, and the cases there cited.

(*u*) Hall *v.* Newcomb, 7 Hill, 416; Spies *v.* Gilmore, 1 Comst. 321; Cottrell *v.* Conklin, 4 Duer, 45; Bank of Albion *v.* Smith, 27 Barb. 489. See the full discussion and citations in these cases. The same doctrine appears to be settled law in Alabama. Tankersley *v.* Graham, 8 Ala. 247. In Bank of Albion *v.* Smith, a parol agreement at the time of indorsement in blank, that plaintiff need not make demand of the maker, at maturity, but that the defendant would be bound to pay without such demand, was rejected. The legal effect of a regular blank indorsement is not subject to oral evidence that the indorsement was without recourse. Wilson *v.* Black, 6 Blackf. 509. An oral contemporaneous agreement cannot show, even as between the alleged parties thereto, that one who indorsed a note in blank was not to be personally liable. Crocker *v.* Getchell, 23 Maine, 392. Or that he was to be liable only as a guarantor. Fuller *v.* McDonald, 8 Greenl. 213; Dibble *v.* Duncan, 2 McLean, 553. So in the earlier Connecticut cases, a blank indorsement, being an absolute engagement to pay at all events, was not liable to be overthrown by evidence of being conditional only. Wylie *v.* Lewis, 7 Conn. 301; Beckwith *v.* Angell, 6 Conn. 315. Both cases overruled in Perkins *v.* Catlin, 11 Conn. 213. See also Bradly *v.* Phelps, 2 Root, 325; Huntington *v.* Harvey, 4 Conn. 124; Palmer *v.* Grant, id. 389, Welton *v.* Scott, id. 527. A blank indorsement imports a guaranty, and an oral contemporaneous agreement between the

by the law, the contract, being settled, must not be unsettled by parol. And since the same injurious results would flow from permitting the legal effect of an indorsement in blank to be destroyed, as if it were an indorsement in full, no indulgence should be granted to the former contract over the latter. Otherwise, indeed, no one can ever know how, or to what extent, an indorser in blank is bound.(*v*)

These latter considerations, which refuse to permit the settled legal import of commercial paper to be varied by parol, appear to be well founded, and in those States at least where the laxer doctrine is not too firmly established, and too widely acted upon for alteration, may well be followed.

8. *Of such Agreements in Respect to the Consideration of a Bill or Note.*

Besides the apparent exceptions to the rule rejecting oral bargains from written notes and bills, already noticed, there are others which have been settled by a multitude of decisions, in respect to the consideration. These are, cases of illegality,(*w*) fraud, alteration (*x*) in the note or bill, and cases of want of consideration.(*y*) But the application to the special cases of what may be called this rule of exception to the general law, is attended with much difficulty. It has already been intimated in preceding chapters, that parol evidence of false representations

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maker, payee, and indorser in blank, that the note was not to be paid until the happening of a future contingent event, cannot be pleaded in defence. As against the principal, this agreement was inadmissible, and much more so against a surety or guarantor, as the result would be to charge him by parol, directly in the teeth of the Statute of Frauds. Watson *v.* Hurt, 6 Gratt. 633; Rice *v.* Ragland, 10 Humph. 545. But as to the objection grounded on the Statute of Frauds, see Barker *v.* Prentiss, 6 Mass. 430; Ulen *v.* Kittredge, 7 id. 233; Moies *v.* Bird, 11 Mass. 436; Turnbull *v.* Trout, 1 Hall, 336; Perkins *v.* Catlin, 11 Conn. 213, and the chapter on Principal and Surety. An indorser in blank of a note absolute and unrestricted on its face, cannot prove an oral contemporaneous bargain that it was given only to be negotiated at a chartered bank. Stubbs *v.* Goodall, 4 Ga. 106. The court treated blank indorsements like indorsements in full.

(*v*) Bank of Albion *v.* Smith, 27 Barb. 489; Tankersley *v.* Graham, 8 Ala. 247.

(*w*) Newsom *v.* Thighen, 30 Missis. 414.

(*x*) Bank *v.* Appleton, 14 Maine, 284. But the alteration must change the liabilities or be material, and be made without authority, or fraudulently.

(*y*) Solly *v.* Hinde, 2 Cromp. & M. 516; Rawson *v.* Walker, 1 Stark. 361; Stackpole *v.* Arnold, 11 Mass. 27; Dexter *v.* Clemans, 17 Pick. 175; Barker *v.* Prentiss, 6 Mass. 430.

of the quality, condition, and value of a chattel is frequently introduced, that it may go in reduction of damages, in an action on a note given for the price, in order to avoid circuity of action. And it has frequently been decided, that showing the want of value in a note "for value received," is not to be considered, as between the parties, as varying the terms of the contract. The express contract to pay at a specified time, the maker is not at liberty to vary by parol, even in a suit by the payee.(*z*) Hence, when a defence of different bargain is substantially one of failure of consideration, it is perfectly good; (*a*) but it must be substantially such.(*b*)

Hence an oral agreement that, if certain notes given as the consideration of the note in suit could not be used in a particular way, as by way of set-off in a suit then pending against the maker, they were to be returned, and the note cancelled, is admissible in evidence.(*c*)

If a note be given for warranted goods, which turn out to be utterly valueless, the note is void. Hence, in order to show such a warranty, though the note be in absolute terms, parol evidence has been admitted of a contemporaneous bargain for deduction, in case the goods should fall below the representation.(*d*) So it has been held, in some cases, that in a contract of sale not reduced to writing, parol may show a condition of the bargain, in a suit upon the note given for the price.(*e*)

If a debtor pay part of his debt before it is due, and a note is given instead of a receipt, with an oral agreement that it shall

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(*z*) Foster *v.* Jolly, 1 Cromp. M. & R. 703, 707; Manley *v.* Boycot, 2 Ellis & B. 46. In Usborn *v.* Larkin, Lord *Tenterden* admitted evidence of a parol agreement, that the note should only be a security on a certain event which had not happened, but the ground was to show a total failure of consideration. Chitty on Bills, 9th ed., 142, note *t*.

(*a*) Smith *v.* Brooks, 18 Ga. 440.

(*b*) See Besant *v.* Cross, 10 C. B. 895, 5 Eng. L. & Eq. 389.

(*c*) Simonton *v.* Steele, 1 Ala. 357. On the same ground of consideration between indorsee and indorser, the latter has been protected by an oral agreement at the time of the unqualified indorsement, that the acceptor or drawer alone should be responsible; though a similar defence might be bad for the drawer or acceptor. Pike *v.* Street, Moody & M. 226, Danson & L. 159; Girard Bank *v.* Comly, 2 Miles, 405. Or that after an unsuccessful legal suit of the maker, and only then, the indorser should be liable. Wright *v.* Latham, 3 Murph. 298, *Taylor*, C. J. dissenting.

(*d*) Shepherd *v.* Temple, 3 N. H. 455.

(*e*) Farnham *v.* Ingham, 5 Vt. 514, overruled in Bradley *v.* Bentley, 8 id. 243. Barlow *v.* Flemming, 6 Ala. 146. Here parol showed that the note was to be returned

be mere evidence that the creditor is to allow interest upon the part paid till the whole becomes due, this agreement is a good defence to the note, between the original parties, as showing want of consideration.(*f*)

It will be noticed that, in cases similar to those cited upon the principle just laid down, the defence of an oral contemporaneous bargain is not admitted as such, but solely as a defence to the consideration. But the one defence is often merely a pretence for the other, which would have been rejected; and the effect has been in such cases to controvert the rule rejecting oral agreements. Often the evidence going to show an oral bargain will not show a fatal want or failure of consideration, though it might show some inadequacy or excess in price, equitably considered. This distinction is not, we think, always kept in view by the courts. The same injurious results would follow from permitting the defence of mistake and the defence of fraud to be introduced as a mere cover for the defence of an oral agreement made with the note or bill, and in variance thereof.

Thus, oral testimony cannot show that a note in terms payable so many days after date was not to be paid in case a certain verdict was obtained in an action between other parties.(*g*) So a widow's note "for value received by my late husband," cannot be subject to the defence, that it was given as an indemnity against liabilities incurred in behalf of the late husband, and that the payor had not been damnified.(*h*)

Parol cannot prove a contemporaneous agreement that the note was made merely to show an apparent amount of funds, as to enable a corporation to obtain a grant from the State, and that it was agreed at the time that it should be given up after pay-

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if the horse died for which it was given, and that it did die. But see a different and the better doctrine. *supra*, p. 513, note *i*. The oral evidence is not admissible when the original bargain, as well as the note, is reduced to writing. M'Coy *v.* Moss, 5 Port. Ala. 88.

(*f*) Slade *v.* Halsted, 7 Cowen, 322. Parol has also been admitted to show that a note was given for acceptances of A, and was payable only on the contingency that A's acceptances were paid at maturity. Thomas *v.* Page, 3 McLean, 167, id. 369.

(*g*) Foster *v.* Jolly, 1 Cromp. M. & R. 703. Lord *Abinger*, C. B.: "At the commencement of the argument I felt some doubt whether this might not be regarded as a question of consideration; but I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration, or collateral security."

(*h*) Ridout *v.* Bristow, 1 Cromp. & J. 231, 1 Tyrw. 84.

ment of interest a few years.(*i*) Nor that the note was given for specific goods in a distant place, and the price of so much was to be deducted from the note as did not arrive at the port of discharge.(*j*) And when a note was given, by a statement on its face, for goods of a certain quality, it was not permitted to show by parol, that the parties agreed and intended that goods of a better quality should be given for that price.(*k*)

Nor could it be shown, in a suit on a note for the hire of a negro, that the value of the labor which might be lost by his sickness should be deducted from its amount.(*l*) Nor against a note purporting to be given "for the rent of land," that the payee also agreed at the time to repair the fencing around the land.(*m*)

It is no defence that one of a number of slaves for which a note was given was to be delivered by the payee into the maker's possession.(*n*) Nor that, if a negro for which the note was given did not suit the defendant, when the note fell due, the plaintiff should take him back, and give up the note.(*o*) Nor that the consideration of an absolute note was the sale of a horse, on condition that the purchaser, if dissatisfied, might return him within three months; and that an offer so to return was made.(*p*) If a note be given for the price of a chattel

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(*i*) Warren Academy *v.* Starrett, 15 Maine, 443.

(*j*) Cunningham *v.* Wardwell, 12 Maine, 466. A owed B, and B owed C, the plaintiff. To discharge his debt to B, A gave C the note in suit, C knowing why it was made, and C gave up a note he had against B. Oral proof was offered and rejected that the plaintiff, on receiving the note in suit, agreed to a deduction, if the note exceeded B's claim on C. The defendant then contended that it was his right to prove a partial failure of consideration But the court held that C's surrender of the note against B was sufficient consideration, though of an amount less than the note in suit. Goddard *v.* Hill, 33 Maine, 582.

(*k*) Thus, a note being given by its terms for "XS" flour, oral testimony cannot show that XSS flour (extra super superfine) was meant. Harnor *v.* Groves, 15 C. B. 667, 29 Eng. L. & Eq 220; Ridout *v.* Bristow, 1 Cromp. & J. 231. But a note expressing to be given for a loan of money, may be shown to have been for the unpaid balance of the purchase money of land. Elliott *v.* Connell, 5 Smedes & M. 91.

(*l*) Caldwell *v.* May, 1 Stew. 425.

(*m*) Evans *v.* Bell, 20 Ala. 509.

(*n*) M'Coy *v.* Moss, 5 Port. Ala. 88 Though the slave had escaped, in this case, the alleged agreement was not admitted to show failure of consideration, the bill of sale saying nothing of delivery, and the sale being complete without it.

(*o*) Daniel *v.* Ray, 1 Hill, S. Car. 32.

(*p*) Allen *v.* Furbish, 4 Gray, 504.

sold, parol cannot show that the price was less than that expressed in the note, for this does not prove failure of consideration.(*q*)

If a note be made with legal interest on its face, an oral contemporaneous agreement of the parties to pay usurious interest cannot be given in evidence, and accordingly the note is not void, but is payable according to its tenor.(*r*)

While, however, parol evidence cannot contradict or vary the written absolute terms of a note or bill, it seems, on much authority, that evidence may be given by parol of an agreement at the time of making, drawing, or indorsing, which is consistent with the instrument. To this rule there can be no objection ; but it seems to have been quite loosely applied. Thus, evidence has been received that a bill was indorsed and handed over for a particular purpose, without giving the bailee the usual rights of indorsee of the bill. So, too, the payee of a joint and several note of two may be compelled to treat one as surety for the other; but only by clear proof of his express assent to do so when the note was delivered to him.(*s*)

So an agreement that a bill of exchange should not be negotiated is provable by parol between the parties in an action for the breach of agreement, although, as we shall subsequently more fully see, it is no defence to the note, when sued by a *bona fide* transferee for value.(*t*)

An instrument which has the form of a promissory note, but was never executed, delivered, or received as such, may be shown by parol, to represent a different bargain from the one its terms import.(*u*) But in a note in the usual form, and regularly

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(*q*) McDuffie *v.* Magoon, 26 Vt. 518.

(*r*) Butterfield *v.* Kidder, 8 Pick. 512. Compare Beete *v.* Bidgood, 7 B. & C. 453, 1 Man. & R. 143.

(*s*) Manley *v.* Boycot, 2 Ellis & B. 46, 56.

(*t*) Robertson *v.* Nott, 14 Mart. La. 122; Coupry *v.* Dufau, 13 id. 90.

(*u*) Goddard *v.* Cutts, 11 Maine, 440. See Ely *v.* Kilborn, 5 Denio, 514; Allen *v.* Furbish, 4 Gray, 504; Barker *v.* Prentice, 6 Mass. 430. A condition that another should sign the same note above his signature, has been held a good defence to the maker, if not complied with, though no question be made as to the consideration. Miller *v.* Gambie, 4 Barb. 146. But an indorser cannot set up an agreement that another also should indorse, which he made the condition of his liability against a plaintiff who does not appear to have known of this condition. Bank of Missouri *v.* Phillips, 17 Misso. 29.

In England, it has been held that, if a person make a note on condition that A shall

delivered, parol evidence cannot properly be admitted to prove any special purpose directly repugnant to the terms of the note.(*v*)

The Scotch rule rejecting oral testimony which conflicts with an absolute note or bill is said to be even stricter than the rule of the English and American courts.(*w*) In France the law upon this subject appears to be quite analogous to the common law.(*x*)

SECTION II.

SUBSEQUENT ORAL BARGAINS.

We must carefully note the difference between prior and subsequent oral bargains.(*y*) While, as we have seen, an alleged prior or contemporaneous verbal agreement, differing from the note itself, is no defence, it is quite obvious that a valid oral agreement may be made after the execution of the note. This new stipulation, if completely executed, and if made for good legal consideration, does in effect execute the note, and doubtless will operate as a perfect defence, by way of payment, discharge, or accord and satisfaction of the note.(*z*) Where the new bargain is distinctly different from the old one, and is substituted for it, and made in discharge of it, this is a kind of

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join, and it is negotiated without his knowledge before A joins, he is not liable, even to a *bona fide* holder for value, for the making of the bill is tainted. Awde *v.* Dixon, 6 Exch. 869, 5 Eng. L. & Eq. 512.

(*v*) Underwood *v.* Simonds, 12 Met. 275.

(*w*) Ross on Bills and Notes, 183.

(*x*) 1 Pardess. 330.

(*y*) This distinction is so important, that a parol agreement for enlargement of time of payment, made prior to the execution of a note, or while in course of execution, though repeated immediately afterwards, has been held no defence to an action on the note, brought before the time to which the parol agreement related, although this agreement was made for a valuable consideration. Frost *v.* Everett, 5 Cowen, 497.

(*z*) Goss *v.* Nugent, 5 B. & Ad. 58, 65. "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement." Per Lord *Denman*.

payment, and has been somewhat considered in the chapter on Payment. But we will briefly illustrate the defence of a new bargain so far as connected with the present section.

A subsequent oral contract of the parties, we repeat, may operate as a novation of the note, embracing, perhaps, that with other dealings of the parties, and enuring to the entire extinction of the prior debt. But to produce this effect, it must be made in good faith, between the parties to the former contract, for good consideration.

1. As to the *necessity of consideration* the rule is clear. The maker of a note may prove orally that the payee, subsequent to the making, agreed that payment might be made to a third person.(*a*) So an oral agreement by which an indorser promised to pay the note punctually at maturity, &c., out of his own funds, and the indorsee, in consideration thereof, promised to take payment in depreciated bills of an insurance company, was a binding substituted agreement.(*b*)

Oral evidence, too, may show that, subsequent to the giving of the note, the contract for which it was given was rescinded by the parties, and that thus the consideration has failed.(*c*)

So, one may agree to permit the discharge of a debt on a note, by the assumption of another liability, or by way of indemnity or security for such new liability. If, for example, the promisee of a matured note request the promisor to be surety for him in a bond to a third person, and agrees to leave enough due upon the note to indemnify the promisor, if the latter should be forced to pay the bond, and the promisor becomes such surety, and is obliged to pay the bond, and then the promisee of the note turns out bankrupt, and his assignee sues the note, this agree-

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(*a*) Low *v.* Treadwell, 12 Maine, 441.

(*b*) Spann *v.* Baltzell, 1 Fla. 301. So in Solomons *v.* Jones, 3 Brev. 54, an oral agreement to extend the time of payment was held good, and not "inconsistent with, but confirmatory of, the note, changing the same in some particulars; not denying that the written contract is what it imports to be, but proving another contract, dispensing with some of the terms of the former." But the agreement was invalid as to an indorsee without notice thereof at the time of the transfer. It has been held that an indorser may make a good subsequent agreement with his indorsee, that he will repay the consideration in certain events, as, on proof of fraud, set-off, or other defences to it, and that this latter contract, so far as it conflicts with the indorsement, will control it. Young *v.* Fuller, 29 Ala. 464.

(*c*) Newton *v.* Jackson, 23 Ala. 335; Allen *v.* Furbish, 4 Gray, 504.

ment is a good defence, *pro tanto*, and a set-off to the action upon the note by the assignee.(*d*)

On the other hand, a subsequent agreement, admitting the force and effect of the note, and providing an accord and satisfaction, or that something else shall be regarded as payment, is null unless made on legal consideration. Hence, a verbal executory agreement by a creditor to accept, in full satisfaction, his debtor's note, with the indorsement of a third party assenting to the arrangement, the note being unequal in amount to the debt, has been held not obligatory, being without consideration.(*e*) So the payment of another debt and a part of that on which suit is brought, the whole being due, is no legal consideration for the promise of forbearance, and hence cannot be urged against a suit brought before the given time is due.(*f*) Indeed, the defence would be no better though this agreement not to sue for a limited time was made in writing under seal by the holder with the promisor.(*g*)

But the oral agreement between the payee of a valid promissory note drawing interest and the makers, after maturity, that, in consideration that the makers will keep the principal sum until a future day mentioned, and then pay it with interest, payment of the note shall be postponed till that day, is not valid.(*h*)

2. Where the new agreement is to extend the time of pay-

(*d*) Ward *v.* Winship, 12 Mass. 480.

(*e*) Hyams *v.* Levy, 1 Speers, 368.

(*f*) Berry *v.* Bates, 2 Blackf. 118; Lowe *v.* Blair, 6 id. 282; Miller *v.* Holbrook, 1 Wend. 317; Gibson *v.* Renne, 19 id. 389; Pabodie *v.* King, 12 Johns. 426.

(*g*) Ibid. Mendenhall *v.* Lenwell, 5 Blackf. 125; Bircher *v.* Payne, 7 Misso. 462.

(*h*) Kellogg *v.* Olmsted, 28 Barb. 96. In this case it was argued, that since the defendants could not have tendered the money, nor would the payee be legally obliged to receive it, until the future day named, this made a good consideration for the agreement. But the court, *Marvin*, J., held, — First: Such an agreement was not good as a forbearance to sue, for it carried no consideration. The creditor derived no more benefit than if he had simply neglected to collect the debt, and the debtor neglected to pay. He gets no additional security, the debt is confessed in full, and hence there is nothing to compromise. The debtor's promise to pay interest is no more than what the law compels to do without the promise. And if he agrees to pay more than the interest for the forbearance of the debt, the instrument would be void for usury. Secondly: The agreement was not good as an accord and satisfaction, although subsequent, because there can be no accord and satisfaction, when one does or agrees to do what by law he is bound to do. See the same point similarly decided in Gibson *v.* Irby, 17 Texas. 173; Miller *v.* Holbrook, 1 Wend. 317; Gibson *v.* Renne, 19 id. 389

ment, another distinction sometimes arises. In some States, as New York and New Hampshire, it is held, on the principle already laid down, that an oral agreement to renew a note or bill, or to defer the time of payment, being made by the parties after the transfer, and on full legal consideration, is valid and binding; and consequently no action will lie upon the note until the expiration of the prolonged period.(*i*) When a subsequent valid engagement for renewal has been made, the defendant must show, in England, that he has applied for the renewal, or the plaintiff will have a verdict.(*j*)

But in other States, as Massachusetts, a distinction is drawn between such subsequent oral agreements as are actually executed, and such as are executory only; and it is considered that the former only can enure as payment, or can be offered in bar of a suit according to the terms of the note. It is not denied that the alleged agreement is valid, but only that, being merely executory, it can be offered in bar of the note. For if the new agreement be not valid, it is of course no discharge of the other; and if it be valid, for the breach of the agreement the holder of the note is liable to an action, in which the maker or other promisor may obtain full indemnity for any injury.

Thus, where the maker of a note, after it fell due, agreed by parol with his creditors and A, that A should receive and hold the maker's wages, as they fell due, for the creditors, and pay monthly instalments on the note, the holder of which should not sue it till a breach of this agreement, the agreement was no defence to a suit on the note by the holder, although two instalments had been paid in pursuance of the agreement. The parol contract was held to be a *nudum pactum*, because it was executory and collateral, and also because it was voluntary and without legal consideration.(*k*)

So a verbal contemporaneous agreement that the note should be given up on executing another note with surety, is, as we have seen, inadmissible. But evidence that a second note had

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(*i*) Gibbon *v.* Scott, 2 Stark. 286; Hoare *v.* Graham, 3 Camp. 57; Erwin *v.* Saunders, 1 Cowen, 249; Frost *v.* Everett, 5 id. 497; Dearborn *v.* Cross, 7 id. 48; Keating *v.* Price, 1 Johns. Cas. 22; Fleming *v.* Gilbert, 3 Johns. 528; Stryker *v.* Vanderbilt, 1 Dutch. 482; Ferguson *v.* Hill, 3 Stew. 485; Grafton Bank *v.* Woodward, 5 N. H. 99.

(*j*) Gibbon *v.* Scott, 2 Stark. 286.

(*k*) Walker *v.* Russell, 17 Pick. 280.

been actually accepted in discharge of the first, would have been admissible, as an accord and satisfaction, under the general issue.(*l*)

A defence to a note payable in one year, that an oral collateral agreement provided that payment should not be demanded until the expiration of five years, is no bar to a suit brought before the lapse of the longer period. For the breach of the collateral promise a suit would lie, if supported by adequate consideration; but the agreement was not merged in the note, nor the note in the agreement.(*m*)

An oral agreement to receive in payment the debt of a third party, is a good defence to the note, provided the agreement be executed; because this defence amounts to payment, which is always, in any form, a good defence.(*n*) But wherever an oral executory contract is made at the giving of the note, if this collateral contract cannot be executed, it is inadmissible in evidence to contradict the note.(*o*)

An executed agreement between promisee and promisor, to the effect that all supplies furnished by the latter to the promisee's mother should be applied towards the note, is a good defence to a suit on the note for its full amount.(*p*) And, indeed, it is a broad doctrine, that any contract under seal may be subjected to proof of a subsequent, executed, oral or written contract for its discharge.(*q*) In the case of notes and bills, the stipulation may provide for a renewal, for a longer or shorter term of credit, for a different place of payment, or a smaller sum, or different securities. But we are inclined to say, that it is only the *performance* of the collateral agreement which makes out a complete defence to a note or bill.(*r*) If still executory, the agreement

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(*l*) Burge *v.* Dishman, 5 Blackf. 272.

(*m*) Dow *v.* Tuttle, 4 Mass. 414. An assignee of a note not negotiable may sue upon a special promise of the maker to pay him, in his own name, or upon the note in the payee's name; for the promise does not merge the note. Hatch *v.* Spearin, 11 Maine, 354.

(*n*) Murchie *v.* Cook, 1 Ala. 41.

(*o*) Honeycut *v.* Strother, 2 Ala. 135; McNair *v.* Cooper, 4 Ala. 660.

(*p*) Crossman *v.* Fuller, 17 Pick. 171.

(*q*) Munroe *v.* Perkins, 9 Pick. 298; Kennebeck Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204.

(*r*) Thompson *v.* Rawles, 33 Ala. 29; Hyams *v.* Levy, 1 Speers, 368, Cushing *v.* Wyman, 44 Maine. 121; Allen *v.* Kimball, 23 Pick. 473.

must be enforced in another suit. Still, as the subsequent suit will furnish full reparation for the aggrieved party, there can be no equitable argument drawn from its necessity to procuring justice, for admitting the agreement to the action on the note.(*s*)

The chief objection to adopting the view in question, is, that it requires two suits instead of one about the same subject-matter, whereas the admission of the collateral agreement would prevent circuity of action. But, as has been well said, this objection is only what is continually encountered where there are independent covenants or contracts, and there can be no allowance of a set-off.(*t*)

It has also been urged that in a promise of forbearance there is really no promise at all by the defendant to pay at the end of the additional period, but only a promise of the plaintiff to forbear in the intermediate time; and that, therefore, if the plaintiff should delay his suit beyond the day prescribed in the note, and should declare on it as payable after the additional period, there would be a material variance.(*u*) But perhaps this may be considered, under some codes of practice, as in some degree artificial, since the subsequent bargain, if operative at all, must operate as a mutual compact; and the implied promise of the defendant, on his part, would be hardly less susceptible of proof than his express agreement, when, as in the case supposed, the new bargain is for the defendant's advantage.

We should therefore say, that if the collateral agreement has not been executed, although the party may have tendered performance, which tender was refused, it is no defence to the note.(*u*) And, therefore, a subsequent parol agreement would be no discharge of the note, if the state of the pleadings shows that it was not executed, though the defendant proves his design and attempt to execute it.(*v*)

An offer of the plaintiff subsequently to accept less than the face of the note, or to submit to some different conditions from those imposed in the note, is valid, as we have seen, if accepted

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(*s*) Allen *v.* Kimball, 23 Pick. 473.

(*t*) Ibid.; Pratt *v.* Gulick, 13 Barb. 297; Central Bank *v.* Willard, 17 Pick. 150; Payne *v.* Ladue, 1 Hill, 116.

(*u*) Allen *v.* Kimball, 23 Pick. 473.

(*v*) Withrow *v.* Wiley, 3 Ind. 379.

and executed, by way of release and acquittance: otherwise, if not accepted. Hence, in the latter case, the proposed stipulation cannot be introduced as evidence of a similar oral contemporaneous agreement, because it would defeat a written contract by oral testimony.(*w*)

The rules above considered have also been applied to the specified place of payment. Thus, if the payee of a note offer orally, at its execution, to receive payment at a different place or in a different way from the written terms, as, for instance, to receive by mail the payment of a note payable at Bank A, this offer is no part of the note, and, if on no additional consideration, is revocable at will. But if the same agreement be performed, it will operate to discharge the note.(*x*) On the other hand, in some States, the place, as well as the time, of payment, may be varied by an executory subsequent oral contract, which cannot be rescinded before action brought, but is available as a defence to the note.(*y*)

A subsequent covenant never to sue the debtor in a simple contract debt is a perpetual covenant, amounting to an absolute release, and may be pleaded as such in an action on the debt, in order to avoid circuity of action.(*z*) This established rule of common law is perfectly applicable to notes and bills. A covenant by the holder with the maker, acceptor, or indorser, to give up the bill or note, or never to sue it, or demand payment of it, has the effect of a perpetual release, to escape multiplicity of suits.(*a*) But a covenant not to sue a simple contract debt for a limited time, is null.(*b*) The same is true of notes and bills. Hence, in a suit on a note, a subsequent promise of the payee,

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(*w*) Underwood *v.* Simonds, 12 Met. 275.

(*x*) Follett *v.* Eastman, 16 Vt. 19; Gilson *v.* Gilson, id. 464.

(*y*) Robinson *v.* Batchelder, 4 N. H. 40; Thompson *v.* Ketcham, 8 Johns. 189.

(*z*) Bac. Abr. Covenant, L; Ayliff *v.* Scrimsheire, 1 Show. 46, 2 Salk. 573, 2 Wms. Saund. 48, note *a*; Smith *v.* Mapleback, 1 T. R. 441, 446; Thimbleby *v.* Barron, 3 M. & W. 210; Cuyler *v.* Cuyler, 2 Johns. 186; Chandler *v.* Herrick, 19 id. 129; Gibson *v.* Gibson, 15 Mass. 106.

(*a*) Barber *v.* Gordon, 2 Root, 95; Reed *v.* Shaw, 1 Blackf. 245; Shed *v.* Pierce, 17 Mass. 623. A sole promisor may plead a covenant not to sue on the note, but if he be one of two or more makers of a joint and several note, he cannot plead a promise to the other, whether given with or without consideration, not even if the agreement be in writing. Shed *v.* Pierce, 17 Mass. 623; Miller *v.* Edmonston, 8 Blackf. 291

(*b*) See *supra*, note *z*.

whether by word or by writing, as by a letter of license, to give the maker one year from the date of the letter to collect his debts, in consideration of his inability to pay, and meanwhile not to sue him, is no bar to an action brought within the time limited.(*c*) And so, where the executrix of the acceptor orally promised to pay the holder out of her private income, provided he should forbear to sue, the promise is null.(*d*)

(*c*) Perkins *v.* Gilman, 8 Piek. 229; Webb *v.* Spicer, 13 Q. B. 886, 894; Ford *v.* Beech, 11 id. 852. Here, the plea in bar was, that after the notes became due, it was mutually agreed by plaintiff, defendant, and A, that A should pay to plaintiff £25 per annum, and so long as A so paid, no suit should be brought on the notes. The plea was held bad, because, if plaintiff were barred of his action on the notes for any period, his right of action would be extinguished altogether, which appeared not to be the intent of the agreement; and that, therefore, the agreement must be construed as merely giving a right of action for the breach thereof.

(*d*) Philpot *v.* Briant, 4 Bing. 717, 1 Moore & P. 754. In this case, the promise being void, the drawer was not discharged by the holder's having promised to give time, and having delayed to sue under such circumstances. And so, wherever the express agreement of the holder not to sue is invalid, for want of consideration or for other cause, and wherever the holder's act does not amount to a binding agreement, as, his receiving interest for a stipulated time after maturity, or mere voluntary delay to enforce the note, — in short, wherever the holder has not disabled himself from suing the principal, — the other parties to the paper are not discharged. Walwyn *v.* St. Quintin, 1 Bos. & P. 652; Badnall *v.* Samuel, 3 Price, 521; Pring *v.* Clarkson, 1 B. & C. 14; Free *v.* Hawkins, 8 Taunt. 92; Hewet *v.* Goodrick, 2 Car. & P. 468; M'Lemore *v.* Powell, 12 Wheat. 554; Bank of U. S. *v.* Hatch, 1 McLean, 90; Hunt *v.* Bridgham, 2 Piek. 581; Oxford Bank *v* Lewis, 8 id. 458; Blackstone Bank *v.* Hill, 10 id. 129; Crosby *v.* Wyatt, 10 N. H. 318; Bailey *v.* Adams, id. 162; Fowler *v.* Brooks, 13 id. 240; Hoyt *v* French, 4 Foster, 198; Strafford Bank *v.* Crosby, 8 Greenl. 191; Freeman's Bank *v.* Rollins, 13 Maine, 202; Pabodie *v.* King, 12 Johns. 426; Fulton *v.* Matthews, 15 id. 433; Reynolds *v.* Ward, 5 Wend. 501; Bank of Utica *v.* Ives, 17 id. 501; Gahn *v.* Niemcewicz, 11 id. 312; Hunter *v.* Jett, 4 Rand. 104; Norris *v.* Crummey, 2 id. 323; Harnsberger *v.* Geiger, 3 Gratt. 144; Planters' Bank *v.* Sellman, 2 Gill & J. 230; Hefford *v.* Morton, 11 La. 115; Bank of South Carolina *v.* Myers, 1 Bailey, 412; Wayne *v.* Kirby, 2 id. 551; Wade *v.* Staunton, 5 How. Miss. 631; Payne *v.* Commercial Bank, 6 Smedes & M. 24; Creath *v.* Sims, 5 How. 192; Waters *v.* Simpson, 2 Gilman, 570; Harter *v.* Moore, 5 Blackf. 367; Rhoads *v.* Frederick, 8 Watts, 448. If the payee have notice that one appearing to be a joint maker is surety only, he discharges the surety, as we have seen elsewhere, by giving time to the principal. This is true alike in law and equity, since the discharge is founded on a variation of the contract in the note between principal and surety. Pooley *v.* Harradine, 7 Ellis & B. 431. Here was a plea on equitable grounds, and it was held that an equity arose from the relation of surety and principal, and the notice thereof to the plaintiff when he took the note. But it was made a query, whether the equity would have existed if the notice had been after taking the note, but before giving time. On this last point see Hollier *v.* Eyre, 9 Clarke & F. 1, 51, per Lord *Cottenham*, with the explanation of *Coleridge*, J. in Pooley *v.* Harradine. See Laxton *v.* Peat, 2 Camp. 185 *a*; Nichols *v.* Norris, 3 B. & Ad. 41. An agreement between holder and indorser before maturity,

There are many things which may operate by way of discharge, release, acquittance, waiver of payment, novation, accord, and satisfaction, or extinguishment, as defences to suits upon notes and bills. Words, bonds, or acts may produce this effect. But the subsequent contract must not be doubtful and inferential merely, and hence, mere indulgence after maturity will not bar a suit otherwise free from objection. But to the consideration of these topics we have devoted a separate chapter.(*e*)

SECTION III.

COLLATERAL WRITTEN CONTRACTS.

THESE may either be indorsed directly on the note, or on detached papers connected with the note by reference forth and back, or transferred therewith, or brought otherwise to the notice of the transferee of the note.

Written contracts collateral to notes may be either contemporaneous or subsequent. A note and a contemporaneous article of agreement are frequently taken together as one agreement, the terms of the agreement expounding and limiting those of the note. If the article be in writing, it is at once free from the principal objection against the admission of oral evidence to affect a written contract, which is, that a higher evidence would be controlled by a lower. It is also not open to the analogous objection, that if a part of the contract is written, and it may therefore be presumed that all which is agreed is written, this article formed no part of the agreement. For it is, obviously, not necessary for the whole of a contract to be on one paper. Hence, in an action on a promissory note, any detached writings, entered into on the same day and connected therewith by direct reference or necessary implications, are admissible in evidence as parts of the same contract, and the conditions of the collateral agreements are conditions precedent.(*f*) If the recital in the

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that the time of payment shall be extended, is a waiver of demand and notice. Spencer *v.* Harvey, 17 Wend. 489; Ridgway *v.* Day, 13 Penn. State, 208; Amoskeag Bank *v.* Moore, 37 N. H. 539.

(*e*) See chapter on Payment.

(*f*) Davlin *v.* Hill, 11 Maine, 434; Fellows *v.* Carpenter, Kirby, 364; Stocking *v*

bond of the same date refers to the note in suit, the plaintiff would seem to be precluded from denying that the note and bond were made at the same time, and related to the same transaction.(*g*)

Through all the law on the subject of written collateral bargains, it must be remembered that these bargains can affect and control only those who are parties to them, or have due notice of them. For nothing is more certain than that if a common negotiable note pass by indorsement for value, the indorsee is wholly unaffected by any bargain, or any state of facts, between former parties, to which he was not in any way privy. The influence of the contemporaneous bargain in the cases now to be considered is limited to the parties to that bargain.

It has been considered that if one who makes a note payable on a day certain, simultaneously subscribes a writing which recognizes the note, and promises, for the same consideration, to pay an additional sum on a contingency, this latter paper merges all prior stipulations, and is a good bargain, it being regarded as the last expression of the understanding of the parties.(*h*) Accordingly, where a collateral agreement becomes so incorporated with the terms of the note as to become a part of the same bargain, parol evidence can no more control or vary the provisions of the agreement than it could those of the note.(*i*)

A condition to a note contained in a writing referred to therein, that, if the amount of the note is not legally due upon certain other notes specified, upon which payments had been made, this note is not to be paid, otherwise it is to be paid, is in the nature of a defeasance or condition subsequent, and is for the benefit of the makers, and the burden of proof will lie upon those for whose benefit the condition was annexed.(*j*)

Fairchild, 5 Pick. 181; Penniman *v* Hartshorn, 13 Mass. 87; Underwood *v.* Simonds, 12 Met. 275; Makepeace *v.* Harvard College, 10 Pick. 298; Bowser *v.* Bliss, 7 Blackf 344; Bailey *v.* Cromwell, 3 Scam 71; Kimball *v.* Grover, 11 N. H. 375; Hunt *v* Livermore, 5 Pick. 395

(*g*) Ewer *v* Myrick, 1 Cush. 16.

(*h*) Cuthbert *v.* Bowie, 10 Ala. 163.

(*i*) Cuthbert *v.* Bowie, 10 Ala. 163; Ferris *v.* Ludlow, 7 Ind. 517. A writing made at the time a note was given, showed that the payee had sold the maker forty shares of stock, and that, if the company should reduce the stock, the payee agreed to account for the reduction. The plaintiff payee could not introduce oral proof of a special consideration for the reduction. Id.

(*j*) McDuffie *v.* Magoon, 26 Vt. 518.

A promissory note conditioned upon full proof of a breach of covenant entered into on the same day by the same parties, and the agreement containing the covenant and referring to the note, though on different papers, are but one contract.(*k*) So, an indorser may show in defence a contemporaneous writing signed by the plaintiff, acknowledging an agreement between them, that the plaintiff should sue out a special writ against the maker, and direct the officer to secure the debt, if possible.(*l*)

A contemporaneous written agreement for renewal is binding on the parties thereto, though detached from the notes, while a verbal agreement would have been bad. Hence, where an executrix gave an acceptance for her testator's debt, taking at the same time a written engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate, that agreement is an available defence to the note, if sued at maturity.(*m*) And, in general, a contemporaneous contract in writing may vary the face of a note,(*n*) where the two instruments are connected by cross reference. But when the collateral contract was simply for renewal of notes at maturity for such period as may be found necessary, this means only one renewal. To allow parol to prove otherwise would be altering the written contract.(*o*)

A contemporaneous collateral covenant must be between the parties to the note, and no others, in order to be available, since it is only to avoid circuity of action that such a covenant is pleadable in law. Hence, such a contract between the defendant *and several other persons* on the one part, and the plaintiffs on the other, that this or that condition shall be ingrafted on the note, is no defence to the note. The agreement, though contemporaneous, is yet collateral and independent, for it cannot

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(*k*) Berry *v.* Wisdom, 3 Ohio State, 241.

(*l*) Phelps *v.* Foot, 1 Conn. 387.

(*m*) Bowerbank *v.* Monteiro, 4 Taunt. 843. See Carr *v.* Stephens, 9 B. & C. 758, 4 Man. & R. 590.

(*n*) Brown *v.* Langley, 5 Scott, N. R. 249. One of three makers of a joint and several note at two months pleaded that the note was given to plaintiffs as trustees of a loan society, to secure them money lent to A; and that at the time all parties agreed in writing that A should repay by weekly instalments, and that if A should make default, notice should be given, &c., &c. Held, that this plea was not sustained by producing the printed regulations of the society as the "agreement," because there was nothing (without the aid of *oral* testimony) to connect the book with the note.

(*o*) Innes *v.* Munro, 1 Exch. 473.

be averred to be parcel of the contract in suit, because in order to be parcel it ought to be between the same parties. If the parties to the note and to the agreement are not the same, cross actions must be resorted to, and not pleas in bar.(*p*)

In declaring on a promissory note absolute on its face and in the ordinary form, it is not necessary to notice a contemporaneous written agreement, varying the terms of the note, contained in a separate paper. Such agreement, when valid at all, is matter of defence.(*q*) Therefore, when an unconditional note is payable on a day certain, and the plea is, that, although apparently due, yet, by virtue of another written instrument of the same parties at the same time, it was not in fact to be paid until the happening of a certain condition; an omission to deny that the said condition has happened is fatal to the plea. Without such a denial, the note is presumed to be due, according to its terms, and it was for the defendant to plead that it was not due.(*r*)

But in some cases the collateral contract is considered so completely independent of the note as to be no bar to the note. Thus where a payee, when he takes a negotiable note, agrees in writing with the maker that he will transfer the note to a third person, if on settlement he is found to be indebted to that third person, this agreement is held to be no defence to an action upon the note. For the note is absolute, while the agreement is only a collateral undertaking that on a certain contingency the payee will indorse it away.(*s*)

So, too, a collateral written agreement, without consideration, for the acceptance of a less sum in lieu of a greater, confessed to be due, or a plea by one joint maker of a covenant under seal not to sue the other, is no defence, as we have already seen.

So, it has been held in many cases, that, when there is a writ-

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(*p*) Webb *v.* Spicer, 13 Q. B. 886; s. c. in Exch. Chamb., id. 894; Salmon *v.* Webb, 3 H. L. Cas. 510, 16 Eng. L. & Eq. 37. The agreement, which failed of being pleaded in bar, was that the note should not become payable until A attained the age of twenty-five years. Turner *v.* Davies, 2 Wms. Saund. 148 *g*, 150, 150 *a*.

(*q*) Smalley *v.* Bristol, 1 Mich. 153. In an indorsement to a bank, an express written agreement from the president that the indorser should never be holden would be void, as a fraud. Loomis *v.* Fay, 24 Vt. 240.

(*r*) Averill *v.* Field, 3 Seam. 390.

(*s*) Porter *v.* Pierce, 2 Foster, 275.

ten agreement to forbear collection of the note, the note will still be payable at its expressed maturity. Hence, when the promisee of a note payable at a day certain contracts at the time the note is given not to demand payment of it until a certain time after its maturity, such contract is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie, but it will be no bar to an action on the note when due by the terms of it. It is like the case, above noticed, of an obligee covenanting not to sue the obligor for a limited time. It does not amount to a defeasance, nor can it be pleaded as such.(*t*)

So a plea of a contemporaneous writing, that, if at maturity it should not be convenient for the defendant to pay the notes, the plaintiff would await the convenience of the defendant, and that, in consideration of the agreement, the defendant promised to pay interest on the notes after maturity, is no bar to an action on the notes at maturity. If any damage is sustained, the remedy is on the written agreement.(*u*)

It has likewise been held, that a writing signed by the payee, warranting the article sold by him and paid for by the note, and promising, if bad, to furnish a good duplicate before the note should be paid, is no defence to the note. There must be a separate action for breach of contract, as the evidence showed no want of consideration for the note.(*v*)

In general, when, by the terms of a contract, the performance by one party is not made dependent upon a prior performance by the other, the promises are independent, and each may maintain an action on the promise of the opposite party, in case of non-performance, without alleging or proving performance by himself.(*w*)

A subsequent written contract very often operates in discharge or acquittance of a note or bill, as where collateral securities are taken in full substitution of the principal, or when higher securities, as bonds, are taken for the lower, or as in the

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(*t*) Dow *v.* Tuttle, 4 Mass. 414; Shed *v.* Pierce, 17 Mass. 623; Central Bank *v* Willard, 17 Pick. 150; Porter *v.* Pierce, 2 Foster, 275; Atwood *v.* Lewis, 6 Misso. 392 Bircher *v.* Payne, 7 id. 462; cases *supra*, p. 532, notes *z* and *a*.

(*u*) Atwood *v.* Lewis, 6 Misso. 392.

(*v*) Kelso *v.* Frye, 4 Bibb, 493.

(*w*) Pratt *v.* Gulick, 13 Barb. 297.

familiar instance of giving a new note payable at a future day, and taking up the old one at maturity.(*x*)

Memoranda. — A contemporaneous memorandum on the note, or, as we have just seen, even on a separate paper, if made by agreement of all the parties before signing, will bind all parties, and all who have, or are legally presumed to have, notice thereof, and may be pleaded either by plaintiff or defendant. Such a memorandum is a part of the note, and qualifies and restricts it, and if it provides for a conditional payment of any sort, it will show that the instrument is not a negotiable note. Most of the decisions in England, at least, have been rendered, not upon the merits of the claim, but upon the technical question whether the promise thus trammelled with a condition should be declared on as an agreement, or as a bill or note. If, however, the memorandum is on a detached paper, it cannot be set up against a holder for value ignorant of its existence.

Thus, an addendum that if any dispute should arise about the sale of goods for which the note is given, it should be void; (*y*) or that it is only a security for all balances up to its amount, which the promisors might happen to owe the payee for so many months ensuing,(*z*) becomes a part of the instrument. And this latter should therefore be declared on as an agreement, not as a note.

If the note be given for money lent, and a condition precedent be written at the foot, the payee, on non-performance of this condition by the maker within the prescribed time, may rescind the contract, and bring suit for his money, and, it is said, without previous demand of payment, or tender of the note.(*a*) So a mem-

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(*x*) See Central Bank *v.* Willard, 17 Pick. 150.

(*y*) Hartley *v.* Wilkinson, 4 Camp. 127, 4 Maule & S. 25. See Cholmeley *v.* Darley, 14 M. & W. 344.

(*z*) Leeds *v.* Lancashire, 2 Camp. 205. The indorsee sued the maker of a note for £200, with this indorsed: "The within note is taken for *security* of all such balances as A may happen to owe B, not extending further than the within-named sum of £200; but this note to be in force for six months, and no money liable to be called for sooner in any case." The incorporated indorsement made the note a mere guaranty, though, in the hands of a *bona fide* holder for value, who received it as a promissory note, Lord *Ellenborough* said it might be considered as such; certainly it would be if on a detached paper, of which an indorsee of the notes had no knowledge. Bowerbank *v.* Monteiro, 4 Taunt. 843.

(*a*) A delivered to B $200, and took B's promise to pay yearly to A or order the lawful interest on $200, provided that B might at any time pay principal and interest.

orandum that the note shall be in force only if the plaintiff shall pay a certain note of a third party, is binding.(*b*)

Even though the marginal memorandum contradicts the note, both as to time and as to mode of payment, yet, if contemporaneous, it may control the note.(*c*) The words "foreign bills," at the foot of a note otherwise negotiable, may be made, as we have seen elsewhere, by evidence of the intent of the parties, a part thereof, so as to defeat its negotiability.(*d*) So "facilities" subsequently put at the left of the note, under the names of the witness, will, with verifying testimony, be construed an engagement to pay *facilities* to the amount expressed.(*e*) So the word "renewed," whether alone,(*f*) or with the time of renewal specified,(*g*) will have force given to it as an agreement. In these and similar cases, parol evidence will show that the memorandum qualifies the promise, and is a part thereof, and is not a collateral contract, varying the original.

So it is with "one half payable in twelve months, the balance in twenty-four months," which, written at the foot of a note "on demand," makes it payable on demand after the limited time.(*h*) Either party may prove the time when, the person by whom, and the circumstances under which, the memorandum was affixed. Nor is there a fatal repugnancy between such a memorandum and the previous words "on demand," as they merely limit their generality, and a promise to pay on demand after a certain number of days is an irregular, but not a very unusual, form of note.(*i*)

A memorandum stated that it was secured by a mortgage held by C, in trust for any indorsee. This memorandum was considered as an integral part of the note, and its provision being unfounded, the note was invalid. Shaw *v.* Methodist Epis. Society, 8 Met. 223.

(*b*) Henry *v.* Coleman, 5 Vt. 402.

(*c*) Fletcher *v.* Blodgett, 16 Vt. 26. The note was for "$ 41.50, one day after date." The memorandum was "payable in merchantable fulled cloth, one year from October next." But the body of the note, except the sum and date, was printed, and so was the word "payable" in the margin. It is evident that the parties made a contract payable in fulled cloth, on time, and having some printed blanks on hand, filled up the spaces, and omitted to cross out the printed "one day after date."

(*d*) Jones *v.* Fales, 4 Mass. 245.

(*e*) Springfield Bank *v.* Merrick, 14 Mass. 322

(*f*) Lime Rock Bank *v.* Mallett, 34 Maine, 547.

(*g*) Central Bank *v.* Willard, 17 Pick. 150.

(*h*) Heywood *v.* Perrin, 10 Pick. 228.

(*i*) Heywood *v.* Perrin, 10 Pick. 228; Wheelock *v.* Freeman, 13 id. 165

So a memorandum of agreement not to compel payment for the amount of the note, but to await the convenience of the promisors, if indorsed upon the note and signed by the payees at the time the note is made, must be taken as part of the instrument,(*j*) though it will render the instrument null and void as to any legal effect.

So a condition written upon a note not to sue for a time, has been held *prima facie* lawful, and the contract not to be vitiated. The ground is that the stipulation was merely made for the business convenience of the parties in a possible suit, if it should be necessary to seek a legal remedy.(*k*)

Words may be added to a note as well after as before signature, if before delivery. For every memorandum must operate, if at all, either as part of the promise to which the promisor gave his signature, or as a subsequent explanation of the manner of performance. Which of these is the actual fact is immaterial, since the promisee took the note with these words, and was accordingly as much subject to the terms of the memorandum, as if they were included in the body of the note, over the defendant's signature.(*l*)

But a memorandum of renewal indorsed on the wrapper of certain notes, cannot be considered as a part of the notes. At most, it will operate only as a collateral contract,(*m*) and hence

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(*j*) Barnard *v.* Cushing, 4 Met. 230. It was decided, therefore, that the plaintiffs could never maintain an action on the note. It was, with all its stipulations, "only an honorary engagement, a memorandum by which the promisees might remind the promisors, by an instrument under their own hands, of an honorary obligation outstanding against them."

(*k*) Chittenden *v.* Ensign, Wright, 721. The note, payable in thirty days, bore this addendum: "The condition o this note is such, that if I am not to be found in the bounds of two hundred miles of this place, the above note is not to be sued for the term of five years from date, it bearing interest from date, and after five years it shall be valid anywhere within the United States W. Ensign." It was held a simple agreement to avoid embarrassment in suit, arising from the defendant's possible absence; and the latter being found before issue of the writ, was liable to the payee's assignee on the absolute part of the note.

(*l*) Jones *v.* Fales, 4 Mass. 245, per *Parsons*, C. J.; Heywood *v.* Perrin, 10 Pick. 228.

(*m*) Central Bank *v.* Willard, 17 Pick. 150. The plaintiffs having discounted a note on the application of the promisor, at maturity, for renewal, indorsed on the wrapper of the note "renewed for three months." The promisor paid interest in advance, but the note was retained by the bank, and no new note given. Held, that an action lay on the note within the three months; that the words on the wrapper were no part of the note; that at most they made only a collateral contract, if so understood by the parties, not to sue for a given time, which could not be given in evidence against the

will require an additional suit, since nothing but a qualification of the note can be introduced in evidence.(*n*) Hence, also, an apparent subsequent condition is sometimes held an ear-mark merely, for the purpose of identification, and not an incorporating of the agreement so as to render the note contingent.(*o*) So a memorandum in the body of a note, that the maker had deposited certain title-deeds with the payee, as collateral security, is not imported into the main agreement, which remains an absolute note.(*p*) So when the maker of a note payable so many days after sight, at the time of making, writes in the margin, "Accepted by myself," these words need not be noticed in declaring on the note.(*q*)

In general, as we have seen, a memorandum will be carried out, and if it make the note contingent, the contingency is pleadable.(*r*) This rule results from the other principle adopted by courts, that the construction of a note is to be gathered from the whole of it, as well from the words on the back as from those on the face, "from all within the four corners." Hence a note, a memorandum subjoined to the note, and a separate memorandum signed by the parties and referring to the note, will all be taken together, if made at the same time, to show what was the contract actually agreed upon.(*s*) That is, it may be so shown, if on the note or on any part of it, to affect all subsequent parties; but if on other paper, however connected with the note, to affect only those who have notice of it.

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note; that the retention of the note by the plaintiffs showed that the agreement was not a payment; and that, though they took interest in advance, they retained the power of suing.

(*n*) Ibid. Wheelock *v.* Freeman, 13 Pick. 165; Heywood *v.* Perrin, 10 id. 228.

(*o*) Brill *v.* Crick, 1 M. & W. 232. A written agreement provided that a pending trial of A *v.* B should be postponed, on B's giving a note on demand as security in case A should recover against B; but otherwise, to be given up. The note was given, but a memorandum was indorsed upon it, stating that the note was given upon the preceding condition. Held no qualification of the note.

(*p*) Wise *v.* Charlton, 4 A. & E. 786, 6 Nev. & M. 364; Fancourt *v.* Thorne, 9 Q. B. 312. See also Beeching *v.* Westbrook, 8 M. & W. 411.

(*q*) Splitgerber *v.* Kohn, 1 Stark. 125, per Lord *Ellenborough*.

(*r*) Briggs *v.* Lapham, 12 Met. 475; Harden *v.* Wolf, 2 Ind. 31. So words written in the margin of an award by the arbitrators, in a distinct sentence, are a part of the award. Platt *v.* Smith, 14 Johns. 368; Edgerton *v.* Aspinwall, 3 Conn. 445.

(*s*) Makepeace *v.* Harvard College, 10 Pick. 298. A foot memorandum agreeing that, if the maker would convey to the payees certain parcels of real estate, a specified sum should be indorsed on the note, is a part of the contract. Ibid.

The doctrine above stated is that adopted in England and most of the United States. But some decisions have inculcated a different doctrine. Thus, a note with a contemporaneous indorsement that the note was to be delivered to B, in consideration of a certain judgment against C, to be assigned to A by B, was held a good promissory note, as well as an agreement, and the indorsement merely a notice to purchasers.(*t*)

There has been much conflict of decisions, both in England and in this country, as to whether the memorandum of *place* of payment, added to a note or bill, amounted to a part of the contract. This subject we have fully considered in a former chapter.(*u*)

If a memorandum originally attached to a note is torn off with the consent of both parties, upon an understanding that the condition therein contained has been performed, and that the note shall henceforth be payable absolutely, the fact of alteration has been held no defence, and the note held good without the memorandum. But if the memorandum be torn off by mistake, or upon an honest supposition that all parties agreed thereto, whereas in fact some did not agree thereto, the note must still be considered as containing the condition or defeasance torn off. Finally, if the memorandum be torn off by the plaintiff, without any consent of the defendant, or belief of his consent, the alteration makes the note wholly void.(*v*)

This topic brings us to the consideration of alterations. In them, as we shall see, the defence is quite similar to that of a different bargain, and is generally supported, *prima facie*, by the appearance of the instrument.

(*t*) Sanders *v.* Bacon, 8 Johns. 485. The same effect was given to a condition indorsed upon a note, that it was to be delivered to the payee by C, as security for accepting for C to the amount of the note; — the note to be void if C should apply certain funds to the discharge of the defendant's notes. Tappan *v.* Ely, 15 Wend. 362.

(*u*) See *supra*.

(*v*) Coolidge *v.* Inglee, 13 Mass. 26.

SECTION IV.

OF THE DEFENCE OF ALTERATIONS.

1. *Whether Alterations are Material or Immaterial.*

An alteration to be material must be of an essential stipulation of the note, and not of a mere memorandum only, indorsed thereon for convenience, as an ear-mark. Thus, a *memorandum* of a collateral agreement between maker and indorsee, indorsed on a bill, is not a material alteration.(*w*) The same is true of added words which are senseless and inoperative either for the injury or benefit of anybody, especially when the note or bill is complete in itself.(*x*)

So when at the foot of an accommodation bill there was a memorandum signed by the last indorser, directing the proceeds of the bill to be credited to the drawer, and in a suit by the last against a prior indorser it appeared that the memorandum had been cut off, this latter was held no part of the bill, and its removal as nowise affecting the rights of the parties.(*y*)

It has been held that words written on the back of a note are no part of the body thereof, *prima facie*, but are presumed to be done after the note is completed. And hence an erasure or interlineation in them need not be explained before pursuing a

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(*w*) Hence, where a bill indorsed in blank by the payees, and left in the hands of the drawer, was transferred without the knowledge of the indorsers, with the following words written by the drawer under his name: "Left with Mr. B. (the plaintiff) as collateral," this was not a material alteration, and did not render the bill void as against the indorsers. Bachellor *v.* Priest, 12 Pick. 399.

(*x*) Granite Railway Co. *v.* Bacon, 15 Pick. 239. A note to "the Q. R Co. (the plaintiffs), or order," was altered by the treasurer of the company, by inserting "the order of E. P." above the words just quoted, but without erasing them. The court said: "The most that can be inferred is, that it was a proposal to insert the name of another payee, never acceded to, and so the note was not altered; and this is fully explained by the evidence. As mere senseless words written on a subsisting instrument, complete in itself, they did not affect the terms, the effect, or the identity of the contract, and so were immaterial. The jury have found that it was done without fraud. It is, therefore, not an alteration affecting the validity of the note."

(*y*) Hubbard *v.* Williamson, 5 Ired. 397. In a deed of a parcel of land in which were a well and pump, an interlineation of the words, "with pump and well of water," after the description by metes and bounds, was considered an immaterial alteration. Brown *v.* Pinkham, 18 Pick. 172.

remedy solely connected with the body of the note. So in an action upon a note on which a small payment has been indorsed, but afterwards cancelled, the note may be read in evidence, without any previous explanation of the erasure.(*z*)

Since the indorsement of a partial payment forms no part of the note, the addition of a date thereto is not an alteration of the note, and nowise affects its validity.(*a*) Still, we must bear in mind the rule before laid down as perfectly established in England and most of the States, that an indorsement may be part and parcel of the original obligation, and that the construction is to be gathered from all parts of the instrument, from the back as well as the face.(*b*)

When a memorandum on the note is of such a character as to be incorporated with the body thereof, being part and parcel of the contract, an erasure or alteration of its terms, or an addition of other words, makes a material alteration. And where to a note already complete a memorandum is added, or words are inserted varying the legal effect of its stipulations, the alteration is material.

Hence, if a promissory note be made payable "with lawful interest," and after it is signed there be added, without the assent of the maker, but with the assent of the holder, in the corner of the note, words expressing a different percentage of interest, the addition is fatal.(*c*)

(*z*) Commonwealth *v.* Ward, 2 Mass. 397; State *v.* McLeran, 1 Aikens, 311; Kimball *v.* Lamson, 2 Vt. 138; Tappan *v.* Ely, 15 Wend. 362. *Infra*, note *b*.

(*a*) Howe *v.* Thompson, 11 Maine, 152.

(*b*) See *supra*, section 1, towards the end. An indorsement made upon an instrument before it is executed may be parcel of the obligation. But before an indorsement can be considered as parcel of a deed, it must be shown affirmatively to have been upon the instrument when executed. Emerson *v.* Murray, 4 N. H. 171, and cases cited. The rule in England has been stated to be, that erasing receipts for part payment on the back of a bill is immaterial in an action to recover the balance, admitted to be due. And so it is in an action for the whole amount, where the receipts have been inserted by a mistake, and scored out to correct it. Thomson on Bills, p. 184. In Missouri, it has been held, that, where a credit is indorsed on a note or bond, and afterwards erased, it devolves upon the payee or obligee to account for the erasure. The ground is, that, if made with the consent of the payee, the indorsement amounts to an admission of payment, and if not made with his consent, it devolves upon him to prove that fact. McElroy *v.* Caldwell, 7 Misso. 587. On the other hand, it has elsewhere been decided, that, if a defendant desires to avail himself of an obliterated indorsement upon a note, he must show by plea that it affects the contract, and that the obliteration was without his consent. Demurrer will not avail. Warner *v.* Spencer, 7 J. J. Marsh. 340.

(*c*) Warrington *v.* Early, 2 Ellis & B. 763, 22 Eng. L. & Eq. 208.

Cutting off a memorandum which makes a note written on demand payable on time, is also a material alteration.(*d*) For such a memorandum, if operative at all, will be so, not as a collateral contract, but as a qualification of the note, and a part thereof.

If the new writing is a mere memorandum, outside of the note, it is not an alteration; and if such a separate memorandum was originally attached to the note, and it had no binding obligation, the cutting it off was no material alteration. For an alteration, to operate as such, must, in the first place, vary the legal meaning of the paper, and in the next place, make the new meaning obligatory. If a memorandum, attached to a note at the time of making, and varying the terms thereof, be taken off by an indorsee, and not produced at the trial, it will be presumed to have been a material and valid part of the contract, unless the holder clearly shows that its removal was no material alteration.(*e*)

So also the figures in the margin of a note or bill are held to be only as an index for convenience of reference, or a kind of abridged statement of the contents, but they form no controlling or essential part of the instrument. And, therefore, an alteration of them does not vitiate it.(*f*) So one may go over with ink what was written in pencil, without the consent of the party bound by it, without impairing his obligation.(*g*)

The insertion of the word *mem.* into a bank check is held not to affect its negotiability, or alter the right of the holder to present it to the bank and demand payment immediately.(*h*) Writing upon the note or bill an especial place of payment, in such a

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(*d*) Wheelock *v.* Freeman, 13 Pick. 165. Where an ordinary sale note for certain bags of wool was given, and a memorandum to this effect inserted therein: "Such part as may be damaged to be taken at such allowance as shall be settled by two experienced brokers," the alteration was held material. Powell *v.* Divett, 15 East, 28. But when, on the other hand, in a policy of insurance on a ship, "at and from A to B, and during her stay there," between the last two words, "and trade" was interlined, this was deemed immaterial. Sanderson *v.* Symonds, 1 Brod. & B. 426.

(*e*) Johnson *v.* Heagan, 23 Maine, 329. The memorandum provided for a delay of collection until a person named should take it up himself, as the maker had paid for the same; and being neither repugnant nor immaterial, its removal made the note void.

(*f*) Smith *v.* Smith, 1 R. I. 398.

(*g*) Reed *v.* Roark, 14 Texas, 329.

(*h*) See *supra*, p. 66.

way as to make this a part of the note or bill, or of the acceptance, is a material alteration. But whether the memorandum of place of payment is to be considered as part of the contract, or merely as a direction where payment will be made, was formerly spoken of as a *vexata quæstio*.(*i*) In a few instances, such an addition was considered to be immaterial, on the ground that the acceptor's responsibility was not affected.(*j*) But those cases have been overruled, and the rule settled at common law as stated above.(*k*) Thus, if the drawer of a bill accepted payable at the house of a banker who has since become insolvent, substitute, without consent, the house of a solvent banker, it avoids the bill, even in the hands of an innocent indorsee for value. The ground is, that it causes the bill to carry with it the appearance of solvency, and therefore holds out a false color to the holder, and that it superadds to the acceptor's contract an order on another house to pay the bill.(*l*)

We have seen that in England a statute has enacted that acceptances of bills drawn payable at the house of a banker or other place shall be general acceptances only, unless the drawer

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(*i*) By Lord *Ellenborough*, in Jacobs *v.* Hart, 2 Stark. 45.

(*j*) So Marson *v.* Petit, 1 Camp. 82, note; Trapp *v.* Spearman, 3 Esp. 57, where Lord *Kenyon* held a defence bad that the bill had been altered by the insertion of the words, "When due, at the Cross Keys, Blackfriars Road." But these decisions have certainly been overruled by Tidmarsh *v.* Grover, 1 Maule & S. 735, and subsequent cases. So in Bank of America *v.* Woodworth, 18 Johns. 315, 19 id. 391, it was decided that every alteration of a note by the maker, with respect to the place of payment, after indorsement, is material, and discharges the indorser's liability. But, of course, it is only in case of accommodation notes, handed back by the indorser after signature, that the maker's memorandum after indorsement will appear. An accommodation note having been made, dated, and indorsed in blank at Albany, where the parties resided, the maker, without the indorser's knowledge or consent, wrote in the margin, "Payable at the Bank of America," i. e. in New York city. Payment was demanded at the Bank of America and refused, and due notice given by mail. The Supreme Court held the alteration immaterial, on the ground that an indorser in blank leaves the place of payment, when none is designated, to the subsequent discretion of the maker, except only when he appoints one in bad faith or at an unreasonable distance. Hence, if the maker finds it convenient, from change of residence, or absence from home, or the like, to alter the place of payment, he may do so. This view was also supported by the chancellor, and a minority of the senators, in an elaborate opinion, making the memorandum a "harmless and convenient direction."

(*k*) A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words, "Payable at Mr. B.'s, C Street." The acceptor was thereby discharged. Cowe *v.* Halsall, 4 B. & Ald. 197, 3 Stark. 36.

(*l*) Tidmarsh *v.* Grover, 1 Maule & S. 735, per Lord *Ellenborough*; Rex *v.* Treble, 2 Taun. 328.

adds special words limiting the payment to a certain place.(*m*) But these statute provisions do not seem to have greatly affected the common rules respecting alteration. For it is still held that an alteration of a general acceptance of a bill by the addition of a place of payment discharges the acceptor, if made without his privity. The reason given is, that the holder may be induced to make presentment at the place specified instead of to the acceptor, and hence the bill might be treated as dishonored, and the defendant inconvenienced, when no presentment had been made. The party called upon to pay might do so and incur costs, for which the acceptor might be made liable at the suit of that party; (*n*) though perhaps, were this the only reason, it might be doubted whether the alteration was so far material as to vitiate the bill.(*o*)

These latter points, decided at nisi prius, have lately been affirmed by the Queen's Bench,(*p*) and are also well established in America.(*q*) However, when the memorandum of a place of payment attached to a promissory note cannot fairly be construed to be a part of the contract, but only a mere indication, for convenience, of the place where the promisor is likely to be found on the day of payment, we should say that it was not obligatory, and hence an erasure of it would be immaterial. Therefore, a note payable to the order of the maker, and by him indorsed in blank, may be treated as a note payable to bearer, notwithstanding there is a memorandum at the foot of the note, indicating a particular place of payment.(*r*)

(*m*) 1 & 2 Geo. IV., ch. 78.

(*n*) Macintosh *v.* Haydon, Ryan & M. 362; Desbrowe *v.* Wetherby, 1 Moody & R. 438, 6 Car. & P. 758; Taylor *v.* Moseley, 1 Moody & R. 439, note, 6 Car. & P. 273, per Lord *Lyndhurst:* Sparkes *v.* Spur, Chitty on Bills, 9th ed., 182, note *p*.

(*o*) Macintosh *v.* Haydon, Ryan & M. 362. But *Tindal*, C. J., in Desbrowe *v.* Wetherby, Moody & R. 438, seems to have considered the liability to pay costs alone sufficient to make the alteration material.

(*p*) Burchfield *v.* Moore, 3 Ellis & B. 683, 25 Eng. L. & Eq. 123.

(*q*) Bank of America *v.* Woodworth, 18 Johns. 315, 19 id. 391; White *v.* Hass, 32 Ala. 430; Oakey *v.* Wilcox, 3 How. Miss. 330. If, after a note has been delivered to the payee, a particular place of payment be inserted therein by interlineation, without the maker's consent, he will be discharged. Ibid. And so he will though the note come afterwards to the hands of a *bona fide* indorsee for value. Nazro *v.* Fuller, 24 Wend. 374.

(*r*) Masters *v.* Baretto, 8 C. B. 433. To decide otherwise, said *Maule* J., would be "laying traps for the unwary."

An alteration in the *sum* of a note, not shown to have been made before execution, or with the privity of the promisor, is material, and renders the note void.(*s*)

In a note payable in goods, the alteration of the articles specified to others, is material. Nor will it make any difference that the actual *value* to be paid remains the same, so much money's worth of one article being substituted for the same worth in another. For one article may be less easily obtained or in much quicker demand than the other. As the promisor in such instruments generally consults his own convenience, or that of the payee, in the articles to be paid, a change in the kind, though not in the nominal amount, may be quite inconvenient if not seriously injurious to him. As there would seem to be no reason for the payee's tampering with the note, except to increase its real value by the alteration,(*t*) this effect might be presumed from the alteration.

A change in the stipulated *interest*, as the addition of the words, "with interest from date," (*u*) or the erasure of the same, or any alteration in the percentage agreed upon,(*v*) is material. And this doctrine has been applied to the case of a note upon which the words "with interest" were written by the maker after it passed from the hands of the surety or indorser, though

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(*s*) Mills *v.* Starr, 2 Bailey, 359; Ogle *v.* Graham, 2 Barr. 132; Pankey *v.* Mitchell, 1 Breese, 301; Rankin *v.* Blackwell, 2 Johns. Cas. 198; Bailey *v.* Taylor, 11 Conn. 531; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Henman *v.* Dickinson, 5 Bing. 183. A and B made a note for $ 20, payable to H, which note B took for the purpose of passing it to the payee; but before he delivered it, B, without the knowledge or consent of A, altered it to $ 120, and then passed it to H for that sum. It was held that A was not liable to pay the note; and that the rule, that when one of two innocent parties must suffer by the fraud of a third person, he who enabled him to commit the fraud must abide the consequences, does not apply in such a case. Goodman *v.* Eastman, 4 N. H. 455.

(*t*) Martendale *v.* Follet, 1 N. H. 95. Here the vitiating alteration was the insertion, in a note payable in "merchantable neat stock," of the word "young" after merchantable.

(*u*) Brown *v.* Jones, 3 Port. Ala. 420; Lubbering *v.* Kohlbrecher, 22 Misso. 596; Whitmer *v.* Frye, 10 id. 348; Trigg *v.* Taylor, 27 id. 245.

(*v*) So when a banker agrees to pay the principal at ten days' sight, with three per cent interest to the day of acceptance, and, on paying one year, tells his customer that he will not in future pay more than two and a half per cent, and in his presence alters the terms of the note by striking out the three and inserting two and a half, this is a material alteration, though, being made by consent, it is binding. Sutton *v.* Toomer, 7 B. & C. 416. So Warrington *v.* Early, 2 Ellis & B. 763.

not then delivered to the party authorized to treat it as available. For after alteration it is not the contract the indorser signed, and the first negotiation being made after the alteration, cannot make it his contract.(*w*)

This case bears no analogy to the one of signing or indorsing a note in blank for the sum, the time, or the place, which blank is to be filled up at the discretion of the party accommodated. For it is obvious that when a note is given with the rate of interest in blank, and the holder inserts therein a sum for interest without the knowledge or consent of the maker, it does not become thereby void.(*x*)

An alteration in the *time* of payment is obviously material.(*y*) It may effected either by changing the day specified for maturity, or, in a note payable at a given time after date, by carrying forward or back the date, so that it will fall due later or earlier. Nor does it make any difference, that by the alteration the maker is apparently benefited. An alteration by which the time of payment is retarded is as fatal as one by which it is shortened, and equally vitiates the note, even in the hands of an innocent indorsee for value.(*z*) For if the day of payment be accelerated, the debtor loses part of the time for which he stipulated, and if it carry interest, that is affected; if it be retarded, the bar of the statute of limitations, or the presumption of payment,

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(*w*) Waterman *v.* Vose, 43 Maine, 504.

(*x*) Visher *v.* Webster, 8 Calif. 109.

(*y*) Master *v.* Miller, 4 T. R. 320; Price *v.* Shute, Molloy, lib. 2, ch. 10, § 28; Paton *v.* Winter, 1 Taunt. 420; Walton *v.* Hastings, 4 Camp. 223; Bathe *v.* Taylor, 15 East, 412; Bishop *v.* Chambre, Dans. & L. 83, Moody & M. 116; Alderson *v.* Langdale, 3 B. & Ad. 660; Knight *v.* Clements, 8 A. & E. 215; Atkinson *v.* Hawdon, 2 id. 628; Clifford *v.* Parker, 2 Man. & G. 909; Upstone *v.* Marchant, 2 B. & C. 10, 3 Dowl. & R. 198; Williams *v.* Jarrett, 5 B. & Ad. 32; Cock *v.* Coxwell, 2 Cromp. M. & R. 291, 5 Tyrw. 1077; Johnson *v.* Duke of Marlborough, 2 Stark. 313; Whitfield *v.* Collingwood, 1 Cur. & K. 325; Parry *v.* Nicholson, 13 M. & W. 778; Sayre *v.* Reynolds, 2 South 739; Stout *v.* Cloud, 5 Littell, 205; Warren *v.* Layton, 3 Harring. Del. 404; Gooch *v.* Bryant, 13 Maine, 386; Hervey *v.* Harvey, 15 id. 357; Henderson *v.* Wilson, 6 How. Miss. 65; Kennedy *v.* Lancaster Co. Bank, 18 Penn. State, 347; Paine *v.* Edsell, 19 id. 178; Hocker *v.* Jamison, 2 Watts & S. 438; Crockett *v.* Thomason, 5 Sneed, 342; King *v.* Hunt, 13 Misso. 97; Davis *v.* Jenney, 1 Met. 221. So in a Scotch case, an alteration from "payable on demand" to "one day after date," was held material. Murdoch *v.* Lee, 1 Bell, Comm. 300, note 2.

(*z*) Outhwaite *v.* Luntley, 4 Camp. 179; Bathe *v.* Taylor, 15 East, 412; Bank of United States *v.* Russel, 3 Yeates, 391; Miller *v.* Gilleland, 19 Penn State, 119; Heffner *v.* Wenrich, 32 id. 423; Lisle *v.* Rogers, 18 B. Mon. 528.

is also postponed. Besides, the date of a note payable a certain time after date is material, and hence an alteration therein destroys the identity of the note. Be it beneficial or prejudicial, the alteration makes the note other than the one the promisor signed,(*a*) and the promisor may, without inquiry whether the alteration help him or hurt him, if it be material, say, in the words of the old civilians, "*in hoc fœdere non veni*," and thus claim to be discharged of all obligation.

This has been carried so far, that if a note be altered in date to one day previous, and it is found that whereas it would have fallen due on Sunday, it now falls due on Saturday, and that by custom in either case it must have been payable on Saturday, so that the days of grace would be the same, and no possible injury done, still the note is void. The rule does not depend on the accelerating or retarding the maturity, or increasing or decreasing the sum, but to insure identity, and to prevent the substitution of one instrument for another.(*b*)

If payment be delayed, it has been urged also that the drawer of a bill, ignorant of the postponement of its maturity, may be out of the country at the time when it becomes payable, and is dishonored, and thus, having made no provision for it, the postponement may greatly injure his credit. It is impossible, therefore, to say that putting off the day of payment is always advantageous to the parties liable.(*c*) In all cases, the inquiry should be, not *has* the defendant been injured by the alteration, but *might* he have been injured? We have seen that some cases go even further than this, if the mere identity of the note is obscured.

Where one note or bill is discharged by the giving of another in payment thereof, and the second bill is vitiated by the promisor, by altering the date or in any other way, since the latter is a

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(*a*) Miller *v.* Gilleland, 19 Penn. State, 119, per *Gibson*, J.

(*b*) Stephens *v.* Graham, 7 S. & R. 505. It is added: "Though the alteration in an obligation from pounds into dollars, from sterling pounds into current pounds, could not do any possible injury to the obligor, still it avoids the bond. So if the sum were lessened."

(*c*) Outhwaite *v.* Luntley, 4 Camp. 179. So when a party gave a written authority to draw a draft upon him "at ninety days from the 10th of April," an alteration of this date to the 16th of April, without his knowledge, discharged his liability as acceptor under the authority. Lewis *v.* Kramer, 3 Md. 265.

nullity, the first will revive again, and the promisor will be liable on it.(*d*)

Although the alteration of the date of a note, where the payment is regulated by it, is, as we have seen, material, yet it is not essential that there should be any date on the note. For if the date be left blank, and its amount be payable so many days after date, the time, as has been said before, will be computed from the day of issue.(*e*) In this particular, therefore, there seems to be a distinction between blank dates and blanks for the sum, &c., the latter being essential to the note, and blanks for the latter implying an authority to fill them up. But it is held that the date being left blank conveys no authority *per se* to fill it up, though it may conduce to show an intent to that effect, and may influence a jury.

Hence, it would seem that if a note payable a month after date be given to the payee, and he inserts a date prior or subsequent to the day of delivery, it avoids the note, even in the hands of an indorsee for value. And the distinction between this and some other material parts left in blank, is, that a note undated is complete; and every alteration afterwards is material. Hence, the question whether leaving the date in blank with collateral circumstances, implies the consent of the promisor to the alteration must go to the jury.(*f*)

An alteration in the date of a general release, which discharges the releasee from all claims "to the day of the date," is material, and, if without the consent of the releasor, avoids the release.(*g*) The insertion of "on demand" in a promissory note may have the same effect.(*h*) So, the alteration of the word "sight" into

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(*d*) Sloman *v.* Cox, 1 Cromp. M. & R. 471. But it has been held that since the acceptance of a specialty in satisfaction extinguishes a note, the latter is not revived if the specialty be afterwards avoided by a material alteration. Mills *v.* Starr, 2 Bailey, 359.

(*e*) See *supra*.

(*f*) Stout *v.* Cloud, 5 Littell, 205; Inglish *v.* Breneman, 5 Ark. 377. A deed of conveyance for slaves having been made with a blank left for the date, the donor inserted it, without fraud or evil design. The deed was good, the date being immaterial. Whiting *v.* Daniel, 1 Hening & M. 390. Where the maker gave the note to the payee as his agent, to be discounted, blank in date and sum, and the payee filled them up, but, before discounting, changed the date, this alteration avoided even the claim of an innocent indorsee for value. Mitchell *v.* Ringgold, 3 Harris & J. 159.

(*g*) Maybee *v.* Sniffen, 2 E. D. Smith, 1.

(*h*) Benjamin *v.* McConnell, 4 Gilman, 536

"date" avoids an acceptance.(*i*) But an alteration of the date of an assignment on a note has been held not to destroy the claim of the assignee, on the ground that it is not an essential part, and is not to be compared with an alteration in a deed, or with a material part of a bill or note.(*j*)

Adding a seal to the promisor's signature is a material alteration. It changes a simple note of hand to a specialty, which is binding on the maker although executed without adequate consideration, and, therefore, relieves the plaintiff from proving the consideration when the onus of that proof might otherwise be shifted upon him.(*k*) Hence, where a joint negotiable note is signed by three persons and a seal afterwards affixed to one name, the note will be void as to the other two also, if affixed without their consent. For a joint action cannot be maintained against the three.(*l*)

So, too, when, as is sometimes the case, a party signs a paper in blank, giving another parol authority to write above his name a promissory note at pleasure, the signature in blank does not authorize anything beyond a simple contract. If the agent add a seal to the signature, and deliver the instrument thus, the promisor will not be bound. It requires an authority by deed, in general, to create an obligation by deed for another,(*m*) although this rule in modern practice is much relaxed.

It has been held that if the seal in a sealed note be carefully cut out, leaving a mere filament by which it remains attached, the seal is as effectually destroyed as if it had been erased or cancelled.(*n*) It should be remembered that a deed is not avoided against the obligee seeking to enforce it by the seal being torn off fraudulently or innocently by the *obligor*, but may be declared on as still subsisting.(*o*) Whether the *attestation* of a note not before witnessed, by one who was not present at the signing, or even by one then present but not then attesting, is a material and vitiating alteration of the contract, must depend, we

(*i*) Long *v.* Moore, 3 Esp. 155, note.

(*j*) Griffith *v.* Cox, 1 Overt. 210.

(*k*) Davidson *v.* Cooper, 13 M. & W. 343; U. S. *v.* Linn, 1 How. 104; Biery *v.* Haines, 5 Whart. 563; Cotten *v.* Williams, 1 Fla. 37; Marshall *v.* Gougler, 10 S. & R. 164.

(*l*) Biery *v.* Haines, 5 Whart. 563.

(*m*) Warring *v.* Williams, 8 Pick. 326.

(*n*) Porter *v.* Doby, 2 Rich. Eq. 49.

(*o*) Cutts *v.* United States, 1 Gallis. 69.

should say, upon the question whether this addition affected the legal rights of any parties. The statute of limitations, or some other statute, may make an important difference between witnessed and unwitnessed notes.(*p*) Perhaps in other States the alteration would be immaterial, if not done fraudulently. But where an unattested note is barred in six years, while an attested note is in this respect like a specialty, and is barred only after the lapse of twenty years from its maturity, adding the name of a witness is obviously making a new contract. Perhaps it may be said that in a question before the jury as to the signature of the promisor, the name of a subscribing witness present at the time might have considerable influence, although it be true that a promissory note needs no subscribing witness.(*q*) We should not think this a reason of much force.

It has been decided that if the payee of a note mutilate it by cutting off the name of the attesting witness, he cannot sue the note at law, because he may have hindered the consideration of the contract from being proved, should a defence arise thereon. Nor can he get relief from equity, that court from an early period presuming everything *in odium spoliatoris*.(*r*) The objection arising from the statute of limitations would apply to erasures also, as well as additions of witnesses' names. But in the case of a deed, it would apparently be otherwise in most of the States, because a witness is not usually necessary to the validity of a deed.(*s*)

Since the addition of subscribing witnesses avoids the instrument as to the party not consenting thereto, his subsequent ratification of the subscription by one only of the witnesses does not cure the defect.(*t*) But it has been held, that if the attestations were added any time before the note passed into actual negotiation, they will be presumed to have received the consent of the maker.(*u*) This must certainly be law, so far as the prin-

(*p*) Brackett *v.* Mountfort, 11 Maine, 115. "Ten years afterwards, when the note had ceased for four years to be a subsisting contract, which could be enforced at law, the attestation was affixed. . . . . It at once infused life into an instrument which had before lost all legal efficacy." Ibid.; Eddy *v.* Bond, 19 Maine, 461.

(*q*) Homer *v.* Wallis, 11 Mass. 309.

(*r*) Sharpe *v.* Bagwell, 1 Dev. Eq. 115.

(*s*) Wickes *v.* Caulk, 5 Harris & J. 36.

(*t*) Henning *v.* Werkheiser, 8 Penn. State, 518.

(*u*) Eddy *v.* Bond, 19 Maine, 461.

ciple that a note is not made until it is delivered, applies to the case. Where the addition of an attestation is clearly made without any fraudulent intent, and without working legal injury, the note will not be void.(*v*) Thus, if a witness who was present at the execution of a note, and actually saw the maker sign it, omit to attest the fact, but afterwards do so, the alteration will not vitiate the note, though made without the consent or knowledge of the promisor. But since the attestation is null if a suit on the note be brought within six years, it will not be barred by the statute, but if brought after six years, it will not be protected by the alteration.(*w*) After a note is signed by one promisor, the attestation generally, when he was not present, of a witness, on seeing another promisor sign, if done through inadvertency, and not wrongfully, does not impair the liability of the first promisor.(*x*)

The act of a payee in procuring a person not present at the execution, nor duly authorized to attest it, to sign as witness, is *prima facie* sufficient to authorize a jury to infer that it was done with a view to improper advantage. But the presumption may be rebutted. The holder, too, may show that although the note had the appearance of carrying a subscribing witness, there never was one; that the name was fictitious, or was a mere subsequent memorandum used for identification, or was written by some wholly unauthorized person; or in fine, that the name, instead of being written there by a witness, was in the handwriting of the defendant himself.(*y*)

When the maker of a note, long after its execution, and after he has become insolvent, authorizes a third person to sign his name

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(*v*) Smith *v.* Dunham, 8 Pick. 246. The note was barred, in this case, not being sued till nine years after maturity. The attestation was made two or three hours after delivery, it having been accidentally neglected, but the court could not distinguish it from one made two or three weeks, months, or years after. *Semble*, that it was not an alteration.

(*w*) Thornton *v.* Appleton, 29 Maine, 298; Eddy *v.* Bond, 19 id. 461; Marshall *v.* Gougler, 10 S. & R. 164. Where, some time after the execution of a single bill, two persons, not present at the execution, and without any new delivery, witnessed it, at the request of the obligee, who was about to assign it, this act, if done by mistake and with intent to witness the assignment only, not the bill, was immaterial. But if done to authenticate the bill, it rendered it void, for alteration. Ibid.

(*x*) Rollins *v.* Bartlett, 20 Maine, 319.

(*y*) Rape *v.* Westcott, 3 Harrison, 244, per *Hornblower*, C. J.; Adams *v.* Frye, 3 Met. 103.

thereto as an attesting witness, it has been held, not only that the validity of the note is not affected, but the payee is protected by this attestation from the subsequent bar of the statute.(*z*)

It would seem from some of the cases that the addition of the name of a witness to a note which already has one witness, and which, therefore, acquires no greater legal efficacy by the addition, would not vitiate it.(*a*) Still, even here it must be true that if the promisor can suffer in any way, the addition may avoid the note. And such an addition has been regarded as absolutely vitiating in its effects by some tribunals,(*b*) on the ground that the attestation, as well as the body of the note, should be subject to the same broad rule, namely, that a material alteration vitiates, be it done innocently or fraudulently. Such appears to be the rule in all the English cases, and in some of the American States, as New York and Pennsylvania, though not in others, as Massachusetts and New Hampshire, the decisions of which have already been alluded to.

The payee's indorsement, "Pay the bearer," may be erased by the party to whom he delivers the note, and a formal assignment written in its stead.(*c*) For while this may give additional security to the holder, it cannot enlarge the liability of the maker or otherwise injure him.

A change in the order of indorsements is material, since one indorser may have indorsed solely on the faith of a prior indorser. And, hence, a court of equity will relieve him as against the indorser who should have preceded him.(*d*)

The words, "We waive notice," or others of similar import, turning an indorser's liability from conditional to absolute, make a material alteration.(*e*)

Adding the name of another drawer or maker to a bill or note is a material alteration, such as will discharge the original par-

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(*z*) Willard *v.* Clarke, 7 Met. 435. At the time of attestation the note was good, and the holder was anxious to have it renewed; instead of which, and for his satisfaction, the promisor proposed to have it attested, and did so. This evidence was held to rebut the charge of fraudulent intent, and to show a lawful and honest purpose.

(*a*) Ford *v.* Ford, 17 Pick. 418; Adams *v.* Frye, 3 Met. 103.

(*b*) Chappell *v.* Spencer, 23 Barb. 584; Miller *v.* Gilleland, 19 Penn. State, 119, per *Gibson*, J.

(*c*) Foote *v.* Bragg, 5 Blackf. 363.

(*d*) Slagle *v.* Rust, 4 Gratt. 274.

(*e*) Farmer *v.* Rand, 14 Maine, 225; Buck *v.* Appleton, id. 284

ties not consenting thereto. Where, indeed, it was a part of the original bargain that the subsequent names should be added, or where the makers after delivery consented to the addition, it is perfectly good at common law, though not under the English stamp law. It was upon their revenue laws that the first English cases turned,(*f*) and this circumstance may be thought to weaken their authority, especially as there has been some conflict of opinion on the subject. But the same points have been expressly affirmed in the later cases, on common-law grounds. Thus, if a person sign a joint and several note with another, as surety, and a third name be afterwards added also as surety, without his consent, the note is vitiated as to him.(*g*) The ground of the rule is twofold. In the first place, the addition of another surety materially alters the rights of the defendant to contribution in case he pays the debt. The liability of a co-contractor is to pay an aliquot part according to the number of persons liable, so that, if the added party is insolvent, his being liable would be a prejudice to the original contractor who had paid all.(*h*) Secondly, the integrity of the note had been affected, and whether beneficially or injuriously to the defendant, was not to be inquired.

So, in this country, the interlineation of the name of another promisor in a blank left in the body of a note, and the addition of his signature to the original promisors, after delivery, and without their consent, renders the note void as to them. Still, slight evidence of even a subsequent assent may bind the original promisors, where the name has been added *bona fide*, without any change in the face or body of the note.(*i*) So,

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(*f*) Clerk *v.* Blackstock, Holt, N. P. 474; Ex parte White, 2 Deac. & Ch. 334. Here, a joint and several note was made to secure the repayment of money loaned. One party signed some time after the borrower. Held, that the first stamp was sufficient, if the last signer signed before the money was advanced, — or though afterwards, if before the advance he had promised to sign. The Nisi Prius decision in Holt was re-affirmed.

(*g*) Gardner *v.* Walsh, 5 Ellis & B. 82, 32 Eng. L. & Eq 162. B., being indebted to the plaintiff, agreed to get two sureties, defendant and C., to join her in a joint and several note to plaintiff. B., a defendant, signed, and gave the note to plaintiff. When defendant signed, B. and plaintiff both intended that C. should sign, but defendant was ignorant of this. C.'s subsequently signing was a material alteration. The case of Catton *v.* Simpson, 8 A. & E. 136, which, upon an almost identical position of facts, had been otherwise ruled, was decided not to be law.

(*h*) Miller, *arguendo*, ibid.

(*i*) Bank of Limestone *v.* Penick, 5 T. B. Mon. 25; Pulliam *v.* Withers, 8 Dana,

when the payee of a note, before its maturity, transferred it to another, and, for the innocent purpose of giving his own personal security to the purchaser, wrote his own name under the makers, adding thereto the word "security," this was held a material alteration, which vitiated the instrument.(*j*) The defendant in such cases pleads *non est factum*, or *non assumpsit*. And if this strict technical plea can be made out, it is sufficient, independent of the state of indebtedness and the equities between the parties.

In a few instances, courts have said that the addition of makers or acceptors, without the consent of the original promisors, is perfectly immaterial, unless done with fraudulent intent. So it is with regard to names added as sureties, apparently for the sole purpose of negotiating the paper. It is not doubted that even such an addition destroys the identity of the instrument, but it is urged that the defendant's liability is not in any way increased or varied, and that it does not cease to be his promise, because that of others is superadded. His promise still continues to be several. The names might have been added with impunity, it is said, to the back of the note, and yet would perform in effect the same office there as below the defendant's signature, since in either position they were sureties for the payee merely, not for the maker.(*k*)

In like manner, where a note is offered in part payment of a purchase, and the seller refuses to take it unless the buyer adds his name under the maker's, such a signature and transfer has been held to make the signer jointly and severally liable with the maker to the holder of the note, and an action has been permitted by him against both as joint makers.(*l*) And so, in Scotland, it has been decided, in clear opposition to the English cases, to be no objection that a new acceptor had been added to the address of the bill, and had accepted without the drawer's

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98. So of bonds. Oneale *v.* Long, 4 Cranch, 60; Speake *v.* United States, 9 id. 28, Harper *v.* The State, 7 Blackf. 61; Smith *v.* Crooker, 5 Mass. 538. In this last case a bond executed by a surety was held good against him, though his name was not inserted till afterwards, when he was not present.

(*j*) Chappell *v.* Spencer, 23 Barb. 584.

(*k*) Montgomery R. R. Co. *v.* Hurst, 9 Ala. 513.

(*l*) Partridge *v.* Colby, 19 Barb. 248. But here the original maker made no defence.

knowledge, after delivery of the bill to the other acceptor, for whose accommodation it was drawn.(*m*) But we think the wiser rule is that which looks first to the integrity of the instrument, and secures that, though there be no actual injury, nor purpose of fraud.

As the addition of names may be material, so may, for the same and additional reasons, the erasure or alteration of signatures already affixed. Thus, the erasure of the name of one of the payees is a material alteration: as in a promise to pay to "A & B, or their order," and indorsed "A & B," but on the face of the note, the words "and B" are stricken off.(*n*) So cutting off the name of one of the makers, and substituting another, vitiates the note as to the parties not assenting.(*o*) So cutting off one of two names signed to a joint and several note discharges the other promisor.(*p*)

The erasure of the name of one of several co-promisors on a note completely discharges him *prima facie*, and the ordinary plea in alterations of *non est factum* is not needed. But of course the holder may show that the signature was cancelled through mistake or fraudulent misrepresentation, or if honestly done, that the liability has revived by subsequent arrangement.(*q*)

But the erasure of a surety's name, by agreement between the surety and the payee of a note, has been held not such an alteration as discharges the principal. For the liability of the surety is accessory to that of the principal, and not joint with him; and the beneficiary of his obligation is the creditor, and not the principal. Hence, if the creditor discharges the surety, the principal cannot object.(*r*)

If a bill is addressed to A & B, by the names of "A, B, & Co.," and they accept it by the name of "A & B," and the address of the bill is afterwards altered to "A & B," this is immaterial, and does not discharge the acceptors.(*s*) If the special

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(*m*) Thomson on Bills, 183, note 1.

(*n*) Cumberland Bank *v.* Hall, 1 Halst. 215.

(*o*) Smith *v.* Weld, 2 Barr, 54; Davis *v.* Coleman, 7 Ired. 424; State *v.* Polke, 7 Blackf. 27; Richmond Manuf. Co. *v.* Davis, id. 412.

(*p*) Mason *v.* Bradley, 11 M. & W. 590; Gillett *v.* Sweat, 1 Gilman, 475. In Mason *v.* Bradley, however, the case actually turned on a point of pleading.

(*q*) Daniel *v.* Daniel, Dudley, Ga. 239.

(*r*) Broughton *v.* West, 8 Ga. 248; Huntington *v.* Finch, 3 Ohio State, 445.

(*s*) Farquhar *v.* Southey, Moody & M. 14.

indorsee's name is incorrectly spelt, and when he indorses it over he writes it correctly, this is no material alteration or variance; nor would it be if correctly written originally, and indorsed by him or his agent incorrectly.(*t*) If a bill be indorsed by the proper parties, a casual misspelling, which does not deceive or injure, may be passed by. So adding the names in full of a firm to a bill drawn by them in the firm's name, has been held no alteration, as being, in effect, only adding the Christian names of the drawers, whose surnames had been affixed to the bill before acceptance; and so much the law would have supplied.(*u*) So if the surname of the payee be interlined subsequent to the delivery, and it be proved that the note was originally given to this payee, the alteration is immaterial.(*v*)

So where a note made payable to a partnership under one name is indorsed by a surety, and afterwards altered by the maker and payee, without the knowledge of the surety, so as to be payable to the same firm under another name, the alteration is immaterial, and does not discharge the surety.(*w*) But the addition of "Junior" to a name, or the erasure thereof, is obviously material.(*x*)

When a person signs a *joint and several note*, on the faith that others would also sign, as co-sureties, the note is vitiated as to him by cutting off one of the signatures.(*y*) But when the holder of a note made by a principal debtor and sureties, by an arrangement with the principal, suffers the signature of one surety to be erased, the note is valid against the principal.(*z*) The mere alteration of a note from "I promise" to "We promise," is material, since it changes a note joint and several before, in legal effect, to one joint only.(*a*)

(*t*) Leonard *v.* Wilson, 2 Cromp. & M. 589, 4 Tyrw. 415.

(*u*) Blair *v.* Bank of Tenn., 11 Humph. 84.

(*v*) Mouchet *v.* Cason, 1 Brev. 307.

(*w*) Arnold *v.* Jones, 2 R. I. 345. A firm did business under the style of A, B, & C, and also as the "Providence Steam-Pipe Co." In the note alluded to, a pen was drawn through the latter words, leaving them legible, and A, B, & C written over them.

(*x*) Broughton *v.* Fuller, 9 Vt. 373.

(*y*) Mason *v.* Bradley, 11 M. & W. 590.

(*z*) People *v.* Call, 1 Denio, 120; State ex rel. Commissioners, &c. *v.* Van Pelt, Smith, Ind. 118.

(*a*) Clerk *v.* Blackstock, Holt, N. P. 474; Humphreys *v.* Guillow, 13 N. H. 385; Hemmenway *v.* Stone, 7 Mass. 58. In Eddy *v.* Bond, 19 Maine, 461, it was decided that if this alteration was made before negotiation, and not by a holder, but by one of the

The alteration of a joint negotiable note by interlining the words "or either of us," or the words "jointly and severally," is material, since it makes a joint instrument joint and several. And hence it has been said that the other partners have no authority to make a joint and several note binding on a partner who does not sign, where the note is not subscribed in the name of the firm, but by the individuals severally composing it.(*b*) But in some States, as Pennsylvania, the distinction between joint, and joint and several notes, has been abolished by statute. In such the alteration is not material.(*c*) So, in Scotland, adding the words "conjunctly and severally" to a joint note, is not a material alteration, since there the several obligation is implied by a joint acceptance, against each acceptor; but alteration of the word "cautioner," which regulates the liabilities of promisors of notes and bills, *inter se*, is material.(*d*)

The addition (*e*) of another name to joint and several promisors, as well as the subtraction (*f*) of one from them, is material, for the added party might, by a part payment, take the case out of the statute of limitations, and so change the liability of the others. But an erasure of the names of the guarantors of a note, it has been held, while in the hands of the guarantee, cannot be objected to by a subsequent or prior indorsee. These indorsements are always subject to erasure, even at trial.(*g*) And so, it is said, if a party signs a note as surety, and at the time makes a memorandum to that effect, the tearing it off by the holder is not in itself material, though alleged to be done for the purpose of charging the surety as principal; for the surety is certainly liable to the holder, and if the suit is not otherwise bad, the erasure is no objection.(*h*)

It appears, however, to be agreed that the law will guard the rights of *sureties* of every sort with great care. No man is to be

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parties, it was no defence, since "it limited their liability to the holder, and did not change their legal rights in relation to each other."

(*b*) Perring *v.* Hone, 4 Bing. 28, 2 Car. & P. 401.

(*c*) Miller *v.* Reed, 27 Penn. State, 244.

(*d*) Gordon *v.* Sutherland, Thomson on Bills, 184, note 3.

(*e*) Byles, *arguendo*, in Gould *v.* Coombs, 1 C. B. 543, though the point was waived in the decision.

(*f*) *Supra*, p. 559, note *p*.

(*g*) Logue *v.* Smith, Wright, 10.

(*h*) Humphreys *v.* Crane, 5 Calif. 173.

held to a contract altered without his consent; and to sureties the doctrine should furnish special protection. Hence, when one signs for another's accommodation a note full in form, with sum, time, and place certain, his liability is limited by the precise terms of the paper; and an addition thereto, as by the words "with interest," is material. It is not analogous to signing blank notes, to be filled as necessity may direct.(*i*) So we have seen that retarding payment, though at first sight harmless, is material; especially is this true of an assignor, not an ordinary indorser, but whose liability depends on his assignee's failing to coerce payment out of the maker by due diligence at maturity. An assignor signing a note of three months, might refuse to incur his liability on one of six months. And since he guarantees the maker's solvency until maturity, an extension of the time, though it may not greatly increase his risk, yet, as it tends to that effect, and so operates to some extent, must be material.(*j*)

Substituting for the general "for value received" the particular consideration of a note is material, because it puts the holder upon inquiring whether that consideration has passed. And, besides, it is evidence of a fact, which, if necessary to be inquired into, must otherwise have been proved by different evidence.(*k*) For the same reason, this striking out the particular consideration may be material.(*l*)

An interlineation of the words *or bearer* is material. It changes the manner of the note's negotiability, a matter which may be of grave importance, because it might deprive the defendant of a set-off otherwise valid and successful.(*m*)

The insertion of *or order* follows the same rule and reason; (*n*) namely, that it makes a note negotiable which was not so before.

(*i*) Waterman *v.* Vose, 43 Maine, 504.

(*j*) Lisle *v.* Rogers, 18 B. Mon. 528; Woodworth *v.* Bank of America, 19 Johns. 391.

(*k*) Knill *v.* Williams, 10 East, 431.

(*l*) On settling an account, a note was written at the foot of the same expressing that the account was the consideration thereof. The note was afterward detached, the consideration stricken out, and the words, "on demand" prefixed. Held, that the alteration was material and *non est factum* a good plea. Benjamin *v.* McConnell, 4 Gilman, 536.

(*m*) Scott *v.* Walker, Dudley, Ga. 243.

(*n*) Pepoon *v.* Stagg, 1 Nott & McC. 102; Johnson *v.* Bank of United States, 2 B. Mon. 310; Bruce *v.* Westcott, 3 Barb. 374.

It is not unusual to leave blanks in promissory notes, sufficient for the insertion of words of negotiability. But the mere fact that a blank is left ample enough to receive additional words without creating suspicion will not alone, and as matter of law, authorize the insertion, after execution and delivery. If the note be imperfect, doubtless, the holder may perfect it by filling up the blanks, since, *prima facie*, they were left for that purpose, provided only he does not contradict the contract made by the rest of the note. But if a note is perfect when delivered, no alteration can be made therein except by consent. Accordingly, since a non-negotiable note is complete, the law will not imply an authority to the holder to make it negotiable.(*o*)

It has sometimes been asserted, obiter, however, and not on the authority of any adjudicated case, that the insertion of the words "or order," "or bearer," is not material.(*p*) But this is true only in the case of a note intended to be negotiable, but in which the words have been omitted by mistake, or in the case of the consent of the parties. Thus, when a bill is indorsed which wants the words, "or order," their insertion by the drawer by consent does not vitiate. The question of consent is for the jury, but it may be inferred from the fact that the defendant himself indorsed the note, and so considered it negotiable.(*q*) The same inference may be drawn from the fact of the defendant's paying interest on the note, or otherwise acknowledging its validity, especially where the intent to make the note negotiable originally is probable.(*r*) The addition of the words "without defalcation or set-off," or any others of equivalent import, is a material alteration.(*s*)

If the holder of a note delivers it up on payment of the amount, he must not alter it so as to prevent the party paying from recourse to prior parties. If he do so, he will have complied with the rule requiring delivery up, though he has ren-

(*o*) Bruce *v.* Westcott, 3 Barb. 374.

(*p*) Clute *v.* Small, 17 Wend. 238, 243.

(*q*) Kershaw *v.* Cox, 3 Esp. 246.

(*r*) Cariss *v.* Tattersall, 2 Man. & G. 890. The note being produced by the payee, the words "or order" appeared to have been substituted for "or other." The attesting witness who prepared the note could not say whether he wrote the words "or order" himself, but said that he ought to have written them. The defendant had paid two years' interest on the note; and hence his consent to the alteration might be inferred.

(*s*) Davis *v.* Carlisle, 6 Ala. 707.

dered it a nullity by erasures; (*t*) but any party who wrongfully defaces or cancels or omits to give up a note or bill becomes liable to an action on the case, if the holder has sustained damage by his breach of duty.(*u*) Since the holder's cancellation of an indorsement discharges the indorser, it discharges also a subsequent indorser, because the former would have been liable over to the latter. But it seems that the former's situation might be explained, as that he was an accommodation indorser, and not liable to his indorsee in any event.(*v*)

But the holder of a bill cancelled by mistake can recover against prior indorsers.(*w*) And if the cashier of a bank, through mistake, cancel a note executed to the bank, it does not affect the right of the bank to recover the debt.(*x*) And if the indorsements on a bill or note, subsequent to that of the payee, are merely made for the purpose of transmitting and collecting the paper, they may be stricken out at the trial, in a suit by the indorsee.(*y*)

From the preceding pages it will be seen that any alteration which in any event may alter a promisor's liability, is material and vitiating, if made without his approbation, and we are not to look to see whether he actually has been prejudiced or not, nor to whether the alteration was designed to benefit, and not injure, the party liable. So any alteration which changes the evidence or the mode of proof is material, like entries or erasures of the consideration or of witness's name. Wherever neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial. Though the alteration be actually against the holder's interest, that will make no difference in its destructive effect. But this

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(*t*) Tomlins *v.* Lawrence, 6 Bing. 376.

(*u*) Paton *v.* Winter, 1 Taunt. 420; Warwick *v.* Rogers, 5 Man. & G. 340. As to evidence of cancellation, see Ralli *v.* Dennistoun, 6 Exch. 483. A plea to an indorsed note that it has been paid and cancelled, not saying by whom it was paid, is bad. For the note may have been paid by the plaintiff, who erases the indorsement, assumes his rights as payee, and sues in his own name. Hawkins *v.* Fellowes, 6 Dana, 128.

(*v*) Curry *v.* Bank of Mobile, 8 Port. Ala. 360.

(*w*) Raper *v.* Birkbeck, 15 East, 17.

(*x*) Boulware *v.* The Bank, 12 Misso. 542.

(*y*) Dugan *v.* United States, 3 Wheat. 172; Cassel *v.* Dows, 1 Blatchf. C. C. 335; Union Bank *v.* Carr, 2 Humph. 345.

latter fact furnishes strong evidence to show that it was not wrongfully made.

2. *Binding Material Alterations.*

A material alteration in a note or bill made *by the consent* of all parties is valid and binding. If a part assent thereto, those assenting are bound, and the others discharged.(*z*) This rule is most obviously just in principle, for *volenti non fit injuria;* but there is some difficulty in its application, on questions of evidence.

If the note be altered by consent of one signer, without the consent of the other, and be declared on as the joint note of both, the plaintiff may recover against one, and the other will recover his costs.(*a*) Consent may be subsequent as well as prior to the alteration,(*b*) since the parties must be as competent to alter their contract after it is made, as originally to make it. Consent to the alteration of a note may be implied as well as express. It may be implied from the nature of the contract,(*c*) or from custom.(*d*) Thus a waiver of demand and notice, written over the signature of several indorsers, is *prima facie* evidence, at least, that it was done with their privity and assent; and the burden is on the indorser to show otherwise.(*e*)

The question of consent is for the jury. Thus, in the case of a blank date, the blank being evidence of authority to fill it up, yet not that authority, it will be error for a court to rule authoritatively, as a point of law, that the parties intended to fill it up.

(*z*) Sweeting *v.* Halse, 9 B. & C. 365; Sutton *v.* Toomer, 7 id. 416; Jacobs *v.* Hart, 2 Stark. 45; Downes *v.* Richardson, 5 B. & Ald. 674, 1 D. & R. 332; Kennerly *v.* Nash, 1 Stark. 452; Paton *v.* Winter, 1 Taunt. 420; Stevens *v.* Lloyd, Moody & M. 292; Bruce *v.* Westcott, 3 Barb. 374; People *v.* Call, 1 Denio, 120; Wilson *v.* Henderson, 9 Smedes & M. 375; Pulliam *v.* Withers, 8 Dana, 98; Burrows *v.* Stoddard, 3 Conn. 160; Goodman *v.* Eastman, 4 N. H. 455; Berry *v.* Berry, 7 J. J. Marsh. 487; Inglish *v.* Breneman, 5 Ark. 377; Arnold *v.* Jones, 2 R. I. 345; Rateliff *v.* Planters' Bank, 2 Sneed, 425; Hills *v.* Barnes, 11 N. H. 395; Ogle *v.* Graham, 2 Penn. 132. So the words, "Attest this 9th of October," were added by consent in Wilson *v.* Jamieson, 7 Barr, 126. So Grimstead *v.* Briggs, 4 Iowa, 559.

(*a*) Broughton *v.* Fuller, 9 Vt. 373.

(*b*) Tarleton *v.* Shingler, 7 C. B. 812; King *v.* Hunt, 13 Misso. 97; Morrison *v.* Smith, 13 id. 234; Bank of Limestone *v.* Penick, 5 T. B. Mon. 25.

(*c*) Hunt *v.* Adams, 6 Mass. 519; Bowers *v.* Jewell, 2 N. H. 543.

(*d*) Woodworth *v.* Bank of America, 19 Johns. 391.

(*e*) Farmer *v.* Rand, 14 Maine, 225; Buck *v.* Appleton, id. 284.

The jury must decide whether a particular date was to be inserted, or no date, or a date at the discretion of the holder.(*f*) So it would be error for the court to decide whether the name of a certain payee was to be written into a blank.(*g*)

If a bill be drawn for a larger sum than that for which it was accepted, and the former sum is altered to the latter in the body of the bill, but by whom, when, or where, is unknown, the acceptance by the defendant will furnish very strong evidence of assent to the smaller sum, and hence, in England, the bill requires but one stamp.(*h*) So when a maker's tells the payee's agent and others that the bill has been altered, and he is not bound to pay it, but will pay it, and give collateral security for payment, this is competent evidence of assent.(*i*) But an offer made by an indorser to renew his note after receipt of notice of protest is not in itself proof of his knowledge of the alteration.(*j*) In some jurisdictions, in order to raise the objection that a note has been fraudulently altered, the maker must allege, under oath, not only the alteration, but also that it was not made by his authority, nor with his consent.(*k*)

If the note have *blanks* left in it, filling them is no alteration. But filling them contrary to agreement or authority of the party who left them is an alteration, which can give the one who filled the blanks no rights against him who left them, though it may bind him who left the blanks to other holders for value. If one not only fills the blanks, but materially changes words which are printed or written on the note, this would be an alteration, even if the change only conforms them to the words written in the blank spaces. And it has been held, in a case which seems somewhat exceptional, that when a principal altered the amount of a note to a less sum, and then gave it to a payee, the surety was still bound.(*l*) This can be maintained only on the ground that the greater contains the less, and that the surety's consent

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(*f*) Stout *v.* Cloud, 5 Littell, 205. See an example of evidence of authority from letters of maker to payee, in Mitchell *v.* Ringgold, 3 Harris & J. 159.

(*g*) Stahl *v.* Berger, 10 S. & R. 170, with cases of bonds there cited.

(*h*) Hamelin *v.* Bruck, 9 Q. B. 306.

(*i*) Humphreys *v.* Guillow, 13 N. H. 385.

(*j*) Kennedy *v.* Lancaster Co. Bank, 18 Penn. State, 347.

(*k*) Reed *v.* Roark, 14 Texas, 329.

(*l*) Ogle *v.* Graham, 2 Penn. 132.

to that which lessened his obligation must be presumed These reasons may be sufficient; and nevertheless, protracting the day of payment might discharge those who have to pay, on the ground that they might not be willing to have an executory contract lying along for the additional period, as there would be an additional risk of the solvency of some party.

An indorsement of a blank note has been called a letter of credit for an indefinite sum. It binds the indorser to any sum, and to any place or time (*m*) of payment which the person to whom he intrusts the note chooses to insert.(*n*) Filling up the payee's name in a blank left for that purpose is not a vitiating alteration.(*o*)

But the rule just stated admits of this qualification, that the note is not binding against the indorser in blank, or surety, in the hands of one who took it knowing that the authority to fill the blank had been transcended. But the knowledge of the indorsee must be clearly established, as well as the authority and the fact of exceeding the authority.(*p*) It has been made a question whether, in case of a blank for the sum, and the authorized sum is exceeded, the note is void *in toto*, or only for the excess above the authorized sum. The latter rule has been followed in some cases which rested on the rules of agency.(*q*) But it seems to us that wherever a blank is so filled up as to make a material alteration in the promisor's contract, especially if he is a surety only, the latter is discharged entirely from the note, as to a party privy to the alteration, on the ground that he never signed the contract.(*r*) And inserting a special covenant or undertaking above a blank indorsement, which is not implied by the course of business or by the law, is a material alteration.(*s*)

Under the English revenue laws, there can be no alteration of a stamped instrument after it has been used for one purpose. The only exception permitted is in the case of the correction of

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(*m*) Wilson *v.* Henderson, 9 Smedes & M. 375; Douglass *v.* Scott, 8 Leigh, 43.

(*n*) Russel *v.* Langstaffe, 2 Doug. 514; Jordan *v.* Neilson, 2 Wash. Va. 164.

(*o*) A bill payable to ——, or order, may be filled up with the name of a payee. Rex *v.* Richards, Russ. & R. 193; Rex *v.* Randall, id. 195; Stahl *v.* Berger, 10 S. & R. 170.

(*p*) Johnson *v.* Blasdale, 1 Smedes & M. 17; Torrey *v.* Fisk, 10 id. 590.

(*q*) Ibid.

(*r*) Bank of the Commonwealth *v.* McChord, 4 Dana, 191.

(*s*) Clawson *v.* Gustin, 2 South. 821.

a mistake, an alteration to conform the contract to the original intent of the parties. Hence, it makes no difference under the stamp law, that after issue all parties consented to and requested, even in writing, an alteration of the note or bill, provided it was already their contract, and available in its original form. It is also well established that an instrument unstamped, or even one improperly stamped, cannot be used in evidence for the establishing, directly or indirectly, of the claim which is sought to be enforced upon the instrument, not even to show its amount. In fine, any alteration which avoids a note at common law avoids it under the stamp law, and alterations have that effect also which are no defence at common law. It is well, therefore, to bear this distinction in mind, in drawing rules and inferences from the English decisions upon alterations.(*t*) In England, the insertion of the words "for value received" does not render the signer of an "I. O. U." liable as for a note on a government stamp.(*u*)

Words which the *law would supply* or annul may be added to a note or bill, and constitute no material alteration.(*v*) For it would be unworthy of the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract.(*w*) Thus, if a bill be made payable on such a day "in the of our Lord 1805," omitting the word *year*, this may be supplied.(*x*) And so we should say that an undated note may have the day of its going into operation written thereon, since the law implies so much. So it is held that the omission of the name of a drawee upon a

(*t*) Bowman *v.* Nichol, 5 T. R. 537; Cordwell *v.* Martin, 1 Camp. 79; Sweeting *v.* Halse, 9 B. & C. 365; Reed *v.* Deere, 7 id. 261; Knill *v.* Williams, 10 East, 431; Bathe *v.* Taylor, 15 id 412; Matson *v.* Booth, 5 Maule & S. 223; Bishop *v.* Chambre, Danson & L. 83; Outhwaite *v.* Luntley, 4 Camp. 179; Walton *v.* Hastings, id. 223; Callow *v.* Lawrence, 3 Maule & S. 95.

(*u*) Gould *v.* Coombs, 1 C. B. 543.

(*v*) Kincannon *v.* Carroll, 9 Yerg. 11; Blair *v.* Bank of Tenn., 11 Humph. 84. Where the word "hundred" was omitted in the second place when it occurred before "pounds" in a bond, and had been inserted without the defendant's knowledge, the alteration did not avoid the instrument, though it made a fatal variance between the over and condition. Waugh *v.* Bussell, 1 C. Marsh. 214, 5 Taunt. 707; Hale *v.* Russ, 1 Greenl. 334; Knapp *v.* Maltby, 13 Wend. 587.

(*w*) Per *Parsons*, C. J., in Hunt *v.* Adams, 6 Mass. 519.

(*x*) Ibid.; and see the cases reviewed of deeds, bonds, &c. See Burnham *v.* Ayer 35 N. H. 351.

bill which has been accepted will not vitiate it. The acceptance supplies the defect, and is an admission, by the acceptor, that he was the person intended.(*y*) Under this head also will fall the numerous cases in which the holders of notes with blanks left for the name of the indorsees have been allowed to write in their names at the trial, or, in some States, to sue without writing in a name; or to erase subsequent indorsements at the trial, when the note has returned to their possession. The old rule was similar, that an obligation with the obligee's name omitted may yet be good by the intent obvious, and the words will be supplied by law.(*z*)

If a cashier simply indorses his name "A. B., Cashier," the indorser has the right to add the name of the bank, especially if he makes the addition at the time the indorsement is made.(*a*)

Mistakes in a note or bill may be corrected, and the alteration will not vitiate; the principle and reason being quite analogous to those stated in the preceding paragraph. The insertion of either words or figures which have been left out by mistake is no defence. Hence the word "months" may be inserted, it has been held, by the holder of a bill payable "twenty-four after date."(*b*) So when a note is intended to be made for eight hundred dollars, and is indorsed by the payee for the maker's accommodation, and by mistake the words "hundred dollars" are omitted, the maker, without the indorser's assent, may insert them.(*c*) Such cases seem to be those of ambiguous contracts, the proper subjects of parol evidence. And the jury are to judge of the words intended to be inserted. So the holder of a note may erase credits entered on it by mistake, and whether they have been so entered is for the jury. It is error for the court to charge absolutely upon the point.(*d*) So an erasure by

(*y*) Wheeler *v.* Webster, 1 E. D. Smith, 1.

(*z*) Langdon *v.* Goole, 3 Lev. 21.

(*a*) Folger *v.* Chase, 18 Pick. 63.

(*b*) Conner *v.* Routh, 7 How. Miss. 176. It was said that a note payable "twenty-four after date" is not void for uncertainty, nor a note on demand; but payable some fixed time after date; and hence it could be admitted in evidence without other testimony, under an averment in the declaration that twenty-four months was the time meant, the jury judging of the fact of the time actually stipulated by the parties. Such a note is evidently payable some fixed time after date,— days, months, or years, — and if declared upon as a note on demand, could not have been read.

(*c*) Boyd *v.* Brotherson, 10 Wend. 93.

(*d*) Tubb *v.* Madding, Minor, 129.

mistake of a special indorsement does no harm, for if done with honest intentions, and without injury to anybody, the law permits the cancelled words to be restored.(*e*)

So when a note is payable to the order of several, the name of one of whom is inserted by mistake, or inadvertently left on when the note is indorsed by the real payees, one of whom was the maker, the indorsee can recover, though the names of all the payees are not in the indorsement, by proving these facts by evidence.(*f*) So the payee of a note whose name has been partially erased so as to be illegible, may recover on proof of execution, delivery, &c., and that he had possession of the note before the trial, when circumstances show that the validity of the note was not affected by the erasure.(*g*) So any mistake may be corrected, though made in a material part of the note or bill, in furtherance of the original intention of the parties, provided their consent can be reasonably implied thereto. An express assent is not required.(*h*)

It will be seen from the illustrations given above that the question has presented itself, both in England and in this country, whether one who makes a material alteration in a note or bill, can afterwards strike out that alteration, and restore the note to its original form, and then maintain his claims under it, as if it had never been altered. The best view we can take of this question — which we suppose to be made difficult rather by peculiar facts and circumstances than by any uncertainty as to the true principle — is this. If the alteration was made fraudulently, or with illegal intention, or if the original words cannot certainly be restored, or if any party has become interested in the note, or affected by it, or related to it, since the alteration, in such a way that the restoration will do any wrong to that party, — in either of these cases, we should say the party must abide by the alteration he made, and accept the consequences of making it. But unless one of these reasons exists, we are not aware

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(*e*) Nevins *v.* De Grand, 15 Mass. 436. "Justice requires, and the law allows it to be done." Per *Parker*, C. J.

(*f*) Pease *v.* Dwight, 6 How. 190. See Allison *v.* Purdy, 6 Penn. State, 501.

(*g*) Justus *v.* Cooper, 7 Blackf. 7; Hatch *v.* Dickinson, id. 48.

(*h*) Jacob *v.* Hart, 6 Maule & S. 142; Brutt *v.* Picard, Ryan & M. 37; Kershaw *v.* Cox, 3 Esp. 246; Clute *v.* Small, 17 Wend. 238; Raper *v.* Birkbeck, 15 East, 17; Fernandez *v.* Glynn, 1 Camp. 426; Bowers *v.* Jewell, 2 N. H. 543

of any good and sufficient argument for refusing to permit him to restore the instrument to its original form and force.

The holder of a bill has no right to make an alteration in it to correct a mistake, unless to make the instrument conform to what *all* parties to it agreed or intended it should have been.(*i*) To such an alteration as this, perhaps the intention of the original parties would be implied by law. But if an instrument had been made which was materially erroneous in its expression of the intent of the parties, and afterwards other persons became parties to it, as by indorsing, or suretyship, it could not now be restored to its original purpose, so as to affect them, without their consent.

SECTION V.

EFFECTS OF ALTERATION.

When a note has become void by alteration, the note itself cannot be the foundation of a recovery in any form of action.(*j*) This is true both at common law and under the English stamp laws. Nor in a declaration on the note can the promisee resort to other evidence to fill out that which is destroyed by tampering with the note. An alteration by the original payee of a note, or by the drawer or payee of a bill, if not fraudulent, although it avoids the instrument, and so destroys their claim under it, may still remit them to their original consideration and revive their claim under it. But if an indorsee thus avoids a note or bill, his indorser would have no remedy over if he paid the note, and therefore the indorsee has thereby discharged his indorser.

In the case of instruments under seal, an alteration by the holder thereof extinguishes all right to recover the property or interest represented by the instrument. The reason, however, is, that the precedent debt which formed the consideration thereof is merged in it, because it is under seal. Hence there is no original cause of action to revert to. Now in the case of

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(*i*) Hervey *v.* Harvey, 15 Maine, 357.

(*j*) Martendale *v.* Follet, 1 N. H. 95, and the cases there cited.

promissory notes and bills, there is no such strictness of doctrine, not even in those jurisdictions which incline to make a note or bill an absolute payment of the preceding debt. The note or bill should be regarded, for the present purposes, merely as a security given by the debtor to his creditor, and which has been unwittingly destroyed. Hence, when the destruction of the security cannot prejudice the debtor in any event, the precedent debt is not discharged. And though it is true that an avoided note, destroyed innocently by a material alteration, cannot even be evidence of the original debt, it does not destroy the debt. The debt is still obligatory, and may be recovered by a suit on the original cause of action.

We have supposed the alteration to be innocent. In case of fraud, the rule is quite different.(*k*) It is the policy of the law to prevent fraud, and for this reason it has pronounced even an immaterial alteration fatal, if made with a purely fraudulent intent.(*l*) Hence if a party voluntarily destroys the paper which narrates the character and conditions of his claim, he cannot afterwards supply the defect with parol evidence. This would be permitting a man to acquire a right of action by his own fraudulent act, in altering his security to the injury of the other party.(*m*) And a second exception is, when the instrument itself created the debt. For here its vitiation, of course, destroys all evidence of the alleged contract between the parties. And the law would certainly refuse to manufacture a new contract from the remnants of the original contract.

There has been a grave difference of opinion (*n*) upon the

(*k*) Newell *v.* Mayberry, 3 Leigh, 250; Martendale *v.* Follet, 1 N. H. 95.

(*l*) Sheppard's Touch. 168, 169, Nunnery *v.* Cotton, 1 Hawks, 222; Den *v.* Wright, 2 Halst. 175; Lewis *v.* Payn, 8 Cowen, 71; Morris *v.* Vanderen, 1 Dallas, 64; Jackson *v.* Malin, 15 Johns. 293; Adams *v.* Frye, 3 Met. 103. The same effect follows in the case of notes and bills. Turner *v.* Billagram, 2 Calif. 520; Lubbering *v.* Kohlbrecher, 22 Misso. 596; Lisle *v.* Rogers, 18 B. Mon. 528. But the opposite view was very decidedly taken in Moye *v.* Herndon, 30 Missis. 110, 121, also the case of a note, on the ground that the motive for an act cannot be inquired into, unless the act itself materially affects the rights of the parties. The first question is, Is the alteration material? If answered negatively, the defence ceases; and hence the inquiry for fraud is impertinent.

(*m*) Wheelock *v.* Freeman, 13 Pick. 165.

(*n*) See White *v.* Hass, 32 Ala. 430; Crockett *v.* Thomason, 5 Sneed, 342

resort to the original debt or consideration; but upon the whole we think that this may generally be made by the party against whom a fraudulent alteration has destroyed a contract. And we suppose this view to be established by principle and adjudicated cases.(*o*)

There has been some question as to *when* an alteration is material. From all the cases, we may collect that a bill or note must not be altered after issue. It is issued as soon as, and not before, it comes to a person capable of enforcing it. Accommodation acceptances, therefore, as to the question of alteration, are negotiated by being exchanged. The drawers have immediately a vested interest in them as a security against their respective acceptances, and accordingly a material alteration after exchange is fatal. Especially is this true when one acceptance is due before the other; (*p*) but a bill is issued essentially by being given for a cross-acceptance, or through the drawee to the payee and present holder. But if payable to the drawer's order, it must either have been accepted by the drawee, or else indorsed by the drawer, to make the alteration material. For until one of these two acts has taken place, the bill cannot properly be said to be in a state of negotiation, nor has a right of action accrued thereon to anybody. Hence an accommodation bill, accepted and deposited by agreement with a bailee, not to be issued at present, may be altered by consent any time before delivery to an indorsee.(*q*)

But after delivery to the drawer of an accepted bill, and the separation of the parties, an alteration is material, since the drawer was entitled to payment according to the original terms; and on an unaccepted bill delivered to the payee, the latter has a good claim against the drawer and indorsers before

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(*o*) Atkinson *v.* Hawdon, 2 A. & E. 628; Sutton *v.* Toomer, 7 B. & C. 416; Alderson *v.* Langdale, 3 B. & Ad. 660; Powell *v.* Divett, 15 East, 29; Jardine *v.* Payne, 1 B. & Ad. 663; Long *v.* Moore, 3 Esp. 155, note; Gould *v.* Coombs, 1 C. B. 543; Jones *v.* Ryder, 4 M. & W. 32; Holland *v.* Hatch, 11 Ind. 497; Waring *v.* Smyth, 2 Barb. Ch. 119; Mills *v.* Starr, 2 Bailey, 359; Whitmer *v.* Frye, 10 Misso. 348; Boardman *v.* Gore, 15 Mass. 331; Lewis *v.* Kramer, 3 Md. 265; Clute *v.* Small, 17 Wend. 238; Merrick *v.* Bonry, 4 Ohio State, 60.

(*p*) Cordwell *v.* Martin, 1 Camp. 79.

(*q*) Downes *v.* Richardson, *supra;* Johnson *v.* Garnett, 2 Chitty, 122; Johnson *v.* Gibb, id. 123; Clifford *v.* Parker, 2 Man. & G. 909; Cox *v.* Troy, 5 B. & Ald. 474; Trigg *v.* Taylor, 27 Misso. 245.

acceptance. An alteration in such a case discharges the drawer and indorsers, though the holder be ignorant of the alteration.(*r*)

As to the question by *whom* an alteration is made, there is much discrepancy between the decisions in this country and in England. The old doctrine was, that any material alteration of a deed, bond, note, or any other written instrument, by a stranger, as completely avoided it as if made by a party claiming under it. But now a broad distinction is made between alterations by parties and alterations by strangers, which latter have been styled spoliations. In this country, any alteration, however material, does not avoid an instrument, if made by a stranger to it, unless it be such as to render the original words illegible or uncertain; in which case it operates like the destruction of the paper; and then, we think, it would open the case for the proof of its contents by secondary evidence. The mutilation, indeed, must be regularly accounted for, and shown not to have been effected by the party, or through his laches. When this is done, the law would allow what remains of the instrument to come in as secondary evidence of the original. It would be obviously unjust that the unauthorized intermeddling of a stranger should have the effect of destroying the rights of innocent parties.(*s*)

In England, however, the courts still seem inclined to retain the old rule, and to pronounce even an alteration by a stranger vitiating to the instrument. This opinion rests upon the severe rules respecting the identity of instruments, but especially that the owner or custodian of instruments must exercise care and vigilance in keeping them, and that it is his fault if a stranger

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(*r*) Bathe *v.* Taylor, 15 East, 412; Walton *v.* Hastings, 4 Camp. 223.

(*s*) Waugh *v.* Bussell, 1 C. Marsh. 311; Raper *v.* Birkbeck, 15 East, 17; Henfree *v.* Bromley, 6 id. 309; Master *v.* Miller, 4 T. R. 320; Read *v.* Brookman, 3 id. 151; Wilkinson *v.* Johnson, 3 B. & C. 428; Fullerton *v.* Sturges, 4 Ohio State, 529; Jackson *v.* Malin, 15 Johns. 293; Den *v.* Wright, 2 Halst. 175; Nichols *v.* Johnson, 10 Conn 192; Stahl *v.* Berger, 10 S. & R. 170; Van Brunt *v.* Van Brunt, 3 Edw. Ch. 14; Malin *v.* Malin, 1 Wend. 625; Lee *v.* Alexander, 9 B. Mon. 25; Lewis *v.* Payn, 8 Cowen, 71; Rees *v.* Overbaugh, 6 id. 746; Rollins *v.* Bartlett, 20 Maine, 319; Boyd *v.* McConnell, 10 Humph. 68; Lubbering *v.* Kohlbrecher, 22 Misso. 596; and especially see the opinion of Mr. Justice Story in U. S. *v.* Spalding, 2 Mason, 478, who pronounced the old doctrine repugnant to common sense and justice, and deserving of no better name than a technical quibble.

has obtained such access to them as to be able to commit the tort.(*t*)

As we have already said above, though a material alteration by one claiming under an instrument will avoid the instrument as to him, it will not avoid the instrument against him. If an alteration be made which discharges a party to a note or bill, and afterwards the same party signs new paper in renewal of the former, he is discharged from this also, unless he signed it with a knowledge of the alteration in the former. But if he had this knowledge, and did not know that he was discharged, he could not, under the general rule, avail himself of his mistake of the law.

One further question has come frequently before the courts, both in England and in this country, upon which the cases are still quite irreconcilable. It is this: Upon which party does the onus of explanation rest, when an altered note or bill is made the foundation of an action? Does it rest on him who claims under the note as it is, or on him who pleads that he became a party to a different note than the one in suit? On general grounds, it would seem reasonable to say that the holder of the note is he on whom, *prima facie* at least, the right, the duty, and the responsibility of possession all rest. The instrument is in his hands; if it has been tampered with, this has been done either by him, or by his connivance, or by his negligence. This may fairly be presumed; and unless he can rebut this presumption by adequate explanation and proof, he must take the consequences. And this rule is certainly sustained by high authority, as well as by strong reasons. Such, indeed, appears to be the view, in the main, of all the English cases, and of many decisions in this country. With regard to the former, it has been suggested that the provisions of the stamp laws require a severity towards suspected alterations which would not be exercised at common law. This may be true, and yet it seems clear to us that some of the English decisions, and especially the later ones, which, indeed, seem to tacitly regard the rule as settled, have thrown the *onus* upon the holder solely upon common-law grounds.

(*t*) Davidson *v.* Cooper, 11 M. & W. 778. The court said that Piggot's Case, 5 Coke, 29 *a*, was not overruled.

The rule is harsh, and may sometimes work injustice; it seems, indeed, at first, to be founded on a presumption of fraud, — a thing which the law never presumes. In reality, however, this is not so. It presumes, as a matter of policy, an *alteration* by the holder, but not a fraudulent one. The presumption must rest somewhere in fact, and if it were put upon the maker, it would force him, as has been said, to take evidence of the appearance of the note at delivery, in order to protect himself against alterations subsequently made without his privity.(*u*) The rule might seem, moreover, to be an unnecessary departure from the one which is clearly established with regard to deeds,(*v*) namely, that alterations are presumed to have been made at the time of, or before delivery, provided they appear in the grantor's handwriting, or are otherwise free from suspicion. For this reason there has been a strong tendency in many courts to depart from the rule indicated above, and to decide that the presumption in negotiable paper, as well as in sealed conveyances, is, that any patent alteration was made before the instrument became operative.

To this extent we cannot go; and, upon the whole, from the many cases on this subject, which our notes will show to be very numerous, and from the best view of the reason and justice of the matter which we are able to take, we should hold: *First*, That the materialness and legal effect of an alteration are purely questions of law, for the court: *Secondly*, That whether there be an alteration, and the time of it, the manner of it, by whom it was made, with what authority, or what design, or on what grounds, are all questions of fact for a jury. But every question that goes to a jury must go with an onus on one party or the other. And we should say, that if the alteration be manifest, or if the defendant can show that there is an alteration, he may stop there; and the onus is upon the plaintiff to

(*u*) Per *Parker*, C. J., Hills *v.* Barnes, 11 N. H. 395.

(*v*) Prevost *v.* Gratz, Pet. C. C. 364; Morris *v.* Vanderen, 1 Dall. 64; Barrington *v.* Bank of Washington, 14 S. & R. 405; Chesley *v.* Frost, 1 N. H. 145. These are cases apparently against the rule in the text, which we think unquestionably established. "An interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, not after." Trowel *v.* Castle, 1 Keble, 21, followed by hundreds of cases. In Doe d. Tatum *v.* Catomore, 16 Q. B. 745, 5 Eng L. & Eq. 349, Lord Campbell expressly drew the distinction between deeds and bills of exchange in this particular.

show that the alteration was made under such circumstances, in regard to time, or person, or purpose, or justification, as would prevent its affecting his rights. We do not mean that the burden is a heavy one; but only that the plaintiff must offer what evidence he can, and the jury will take the question. But they cannot find for the plaintiff who sues on an altered note, unless they are in some legal way satisfied that the note is one on which the action may legally rest. Undoubtedly this rule may sometimes work injustice.(*w*) If one makes a note, and at the

(*w*) In the following cases the presumption seems to be that the alteration was subsequent to the execution and delivery, and the onus of the explanation is on the holder. Henman *v.* Dickinson, 5 Bing. 183; Johnson *v.* Marlborough, 2 Stark. 313; Knight *v.* Clements, 8 A. & E. 215; Clifford *v.* Parker, 2 Man. & G. 909; Bishop *v.* Chambre, Moody & M. 116, 3 Car. & P. 55; Taylor *v.* Mosely, 6 id. 273; Whitfield *v.* Collingwood, 1 Car. & K. 325; Cariss *v.* Tattersall, 2 Man. & G. 890; Leykariff *v.* Ashford, 12 J. B. Moore, 281; Byrom *v.* Thompson, 11 A. & E. 31; Davidson *v.* Cooper, 11 M. & W. 778; Parry *v.* Nicholson, 13 id. 778; Agricultural, &c. Co. *v.* Fitzgerald, 16 Q. B. 432; Semple *v.* Cole, 3 Jur. 268, Doe d. Tatum *v.* Catomore, 16 Q. B. 745; 2 Taylor, Ev. 1391; Chettle *v.* Pound, Bull. N. P. 255; Fitch *v.* Jones, 5 Ellis & B. 238; Sibley *v.* Fisher, 7 A. & E. 444; Wilde *v.* Armsby, 6 Cush. 314; Falmouth *v.* Roberts, 9 M. & W. 469; Bowers *v.* Jewell, 2 N. H. 543; Scott *v.* Walker, Dudley, Ga. 243; Burton *v.* Pressly, Cheves, Eq. 1; Kennedy *v.* Lancaster Co. Bank, 18 Penn. State, 347; Heffner *v.* Wenrich, 32 Penn. State, 423; Archer *v.* Ward, 9 Gratt. 622; Daniel *v.* Daniel, Dudley, Ga. 239; Miller *v.* Reed, 27 Penn. State, 244; U. S. *v.* Linn, 1 How. 104; Wilson *v.* Henderson, 9 Smedes & M. 375; Commercial, &c. Bank *v.* Lum, 7 How. Miss. 414; Abbe *v.* Rood, 6 McLean, 106; Paine *v.* Edsell, 19 Penn. State, 178; Clark *v.* Eckstein, 22 id 507; Miller *v.* Gilleland, 19 id. 119; White *v.* Hass, 32 Ala. 430; Burnham *v.* Ayer, 35 N. H. 351; Simpson *v.* Stackhouse, 9 Barr, 186; Jackson *v.* Osborn, 2 Wend. 555; McMicken *v.* Beauchamp, 2 La. 290; Hills *v.* Barnes, 11 N. H. 395; Humphreys *v.* Guillow, 13 id. 385; Walters *v.* Short, 5 Gilman, 252; Trigg *v.* Taylor, 27 Misso. 245; Warren *v.* Layton, 3 Harring. Del. 404; Tillou *v.* Clinton & Essex Mut. Ins. Co., 7 Barb. 564; Runnion *v.* Crane, 4 Blackf. 466; Gillett *v.* Sweat, 1 Gilman, 475; Fontaine *v.* Gunter, 31 Ala. 258, 265. *Contra*, Cumberland Bank *v* Hall, 1 Halst. 215; Clark *v.* Rogers, 2 Greenl. 143; Heffelfinger *v.* Shutz, 16 S. & R. 44; Sayre *v.* Reynolds, 2 South. 737; Farnsworth *v.* Sharp, 4 Sneed, 55; Huntington *v.* Finch, 3 Ohio State, 445; Gooch *v.* Bryant, 13 Maine, 386; Matthews *v.* Coalter, 9 Misso. 696; Beaman *v.* Russell, 20 Vt. 205. Whether an alteration is material is for the court. Whether, if material, it is a defence, is for the jury. Heffelfinger *v.* Shutz, 16 S. & R. 44; Commissioners, &c. *v.* Hanion, 1 Nott & McC. 554; Penny *v.* Corwithe, 18 Johns. 499; Price *v.* Tallman, Coxe, 447; Bailey *v.* Taylor, 11 Conn. 531; Tillou *v.* Clinton & Essex Mut. Ins. Co., 7 Barb. 564; Steele *v.* Spencer, 1 Pet. 552; Stephens *v.* Graham, 7 S. & R. 505; Bowers *v.* Jewell, 2 N. H. 543; Davis *v.* Carlisle, 6 Ala. 707; White *v.* Hass, 32 id. 430; Jones *v.* Ireland, 4 Iowa, 63; Arnold *v.* Jones, 2 R. I. 345; Maybee *v.* Sniffen, 2 E. D. Smith, 1; Agawam Bank *v.* Sears, 4 Gray, 95; Nichols *v.* Johnson, 10 Conn. 192; Hill *v.* Calvin, 4 How. Miss. 231; Fort *v.* Meacher, Riley, 248; Emerson *v.* Murray, 4 N. H. 171; Rankin *v* Blackwell, 2 Johns. Cas. 198;

suggestion of the payee adds something to the amount, or alters the date by interlineation and perhaps erasure, before giving it, certainly it would be a great misfortune for the payee to find that his suggestion, and the promisor's compliance with it, had made the note valueless. But every one ought to know enough and to think enough of what he is doing, not to take so important an instrument as a note or bill, to the very face of which such a taint as that of obvious alteration attaches, without possessing the means of explaining it. And nothing could protect such a party but the opposite presumption, that every alteration was made before the holder and plaintiff became possessed of it, — a presumption which, it cannot be necessary to say, would be liable to do great mischief, and to facilitate fraud in an extreme degree. And it could not but cause great embarrassment and uncertainty in the use of these important instruments of business, if he who issued one was liable to have it returned to him with an important alteration as to time or amount, for which he had made no preparation or calculation, but which bound him because he could give no explanation of what had happened to an instrument of which he had neither possession nor control.

The plaintiff is bound to account for the alteration, if called

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Wilbur *v.* Wilbur, 13 Met. 405; Finney *v.* Turner, 10 Misso. 207; Wickes *v.* Caulk, 5 Harris & J. 36; Crabtree *v.* Clark, 20 Maine, 337; Pullen *v.* Hutchinson, 25 id. 249; Kimball *v.* Lamson, 2 Vt. 138; Gillett *v.* Sweat, 1 Gilman, 475. See Stoner *v.* Ellis, 6 Ind. 152. Not a few of the cases cited to the latter point expressly adopt a third rule upon this subject, to wit, that there is *no* presumption whatever as to when the alteration is committed. It seems difficult for us, however, to conceive a case so nicely balanced that there is no burden of proof in it; yet if there be a burden of proof, it exists only because there is a contrary presumption to rebut In Ely *v.* Ely, 6 Gray, 439, the court below instructed the jury, that, in the absence of all proof to the contrary, the presumption was that the alterations were made prior to or contemporaneous with the mortgage. This was held incorrect, and it was said that there was no such legal presumption, but that it was a question for the jury on all the evidence in the case. It is also said, in some of these cases, that if an alteration is suspicious on the face, in the opinion of the court, it must go to the jury with the onus on the plaintiff; but otherwise, without any presumption at all. So Matthews *v.* Coalter, 9 Misso. 696; Maybee *v.* Sniffen, 2 E. D. Smith, 1, and other cases *supra*. A stipulation indorsed on a note by the payor, is not to be taken as a part of that instrument without evidence that it was written at the time when the note was made. Stone *v.* Metcalfe, 4 Camp. 217; Brill *v.* Crick, 1 M. & W. 232. *Contra*, apparently, Jones *v.* Fales, 4 Mass. 245; Fletcher *v.* Blodgett, 16 Vt. 26. It lies upon the party seeking to enforce a bill or note to account for any alteration that appears on the face of the instrument. *Tindal*, C. J., Clifford *v.* Parker, 2 Man. & G. 909.

upon to do so by the issue raised.(x) But when the making of the bill as set out in the declaration is admitted on the record, and the only issue is on the indorsement, it does not lie on the party who produces the bill for the mere purpose of proving the indorsements to account for an alteration in the body.(y)

It has been stated that where an alteration is against the interest of the party claiming under it, then, at all events, the law will not throw upon him the burden of accounting for it, since it would be an unreasonable presumption, in case of doubt, that a party acted against his interest.(z) But, according to the opinion already expressed, we cannot think that this additional circumstance will always shift the burden of proof. It may be that the plaintiff intended and expected the alteration to enure to his benefit. Besides, as we have repeated more than once, the question will frequently turn not so much upon injury or benefit as upon alteration or no alteration. We think, therefore, that the case must go to the jury as before, though the evidence which shows the alteration to be against the party's interest would probably greatly influence them to decide that he did not make it.

In an apparent alteration, it has been held, in this country, that the party impeaching the note may prove alterations in other notes which formed its consideration, to show that its alteration was probably fraudulent.(a) As a general rule, this must be open to doubt; and in England it has been held that he cannot go into evidence to show that other bills have likewise been altered.(b)

So also in England it has been held that the jury cannot decide for the holder, as to the time and character of the alteration, merely from inspection of the writing.(c) And this seems to us in accordance with the principles already stated above. But the question is not thoroughly settled, since, in some cases,

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(x) Per *Parke*, B., Parry *v.* Nicholson, 13 M. & W. 778.

(y) Sibley *v.* Fisher, 7 A. & E. 444.

(z) 1 Greenl. Ev. § 564; Beaman *v.* Russell, 20 Vt. 205; Bailey *v.* Taylor, 11 Conn. 531; Coulson *v.* Walton, 9 Pet. 62, 78; Heffelfinger *v.* Shutz, 16 S. & R. 44; Pullen *v.* Shaw, 3 Dev. 238.

(a) Rankin *v.* Blackwell, 2 Johns. Cas. 198.

(b) Thompson *v.* Mosely, 5 Car. & P. 501.

(c) Knight *v.* Clements, 8 A. & E. 215, overruling Taylor *v.* Mosely, 6 Car. & P. 273, which had taken the other ground. See Clifford *v.* Parker, 2 Man. & G. 909.

in this country, the opposite has been held.(*d*) The same discrepancy exists as to the presumption arising from the fact that ink of different colors has been used in an instrument; though in fact this should certainly be regarded as a question of evidence, and not of legal presumption.(*e*)

The usual plea in the case of altered deeds and bonds was and is *non est factum.*(*f*) The same plea, or its equivalent, *non fecit*, *non assumpsit*, is the common one in defence against altered notes and bills. In England some distinctions are drawn, by which a special plea is necessary when the alteration is of a certain specified character, and the pleas or specifications in this country should be equally precise in the statement of substantial facts. On this ground it is held, that, in a joint and several note, when the name of one maker is cut away, the plea must be special, since the defendant could not answer simply that he did not make the note, for he is liable for the whole note personally.(*g*)

We have already stated, at the beginning of this section, that a material alteration of a bill of exchange or a promissory note once issued, if made by the holder thereof, renders it utterly void, except against parties consenting to the alteration. Since such an alteration completely revokes the written promise, the bill or note cannot be sued, though afterwards transferred to an innocent indorsee for value.

This rule was established at a very early date with regard to

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(*d*) Ely *v.* Ely, 6 Gray, 439, 442; Bailey *v.* Taylor, 11 Conn. 531; Crabtree *v.* Clark, 20 Maine, 337; Gooch *v.* Bryant, 13 id. 386; Printup *v.* Mitchell, 17 Ga. 558. And see Doe d. Tatum *v.* Catomore, 16 Q. B. 745, 5 Eng. L. & Eq. 349; Vanhorne *v.* Dorrance, 2 Dall. 304; Wickes *v.* Caulk, 5 Harris & J. 36.

(*e*) Smith *v.* McGowan, 3 Barb. 404; Jackson *v.* Jacoby, 9 Cowen, 125; Crabtree *v.* Clark, 20 Maine, 337; Jones *v.* Ireland, 4 Iowa, 63.

(*f*) Com. Dig. Fait, (F. 1); Cospey *v.* Turner, Cro. Eliz. 800.

(*g*) Mason *v.* Bradley, 11 M. & W 590; Calvert *v.* Baker, 4 id. 417; Davidson *v.* Cooper, 11 id. 778; Hemming *v.* Trenery, 9 A. & E. 926; Knight *v.* Clements, 8 id 215; Heydon *v.* Thompson, 1 id. 210; Crotty *v.* Hodges, 4 Man. & G. 561; Bradley *v* Bardsley, 14 M. & W 873. In the following American cases points of pleading on alteration were raised and decided. Daniel *v.* Daniel, Dudley, Ga. 239; Brown *v.* Jones, 3 Port. Ala. 420; Archer *v.* Ward, 9 Gratt. 622; U. S. *v.* Linn, 1 How. 104; Cotten *v.* Williams, 1 Fla. 37; Whitmer *v.* Frye, 10 Misso 348. In most of these, it is held, that where an answer contains an allegation of alteration, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff Humphreys *v.* Crane, 5 Calif. 173.

deeds, and has been extended to all other written instruments. There is obviously no substantial reason, though at first it was a little doubted, why the rule which avoids instruments under seal on the ground of alteration should not be applied to negotiable paper. Indeed, it has been considered with truth, that more dangerous consequences would flow from permitting alterations in bills and notes than in deeds, and the former are more readily susceptible of alteration than the latter, to which the names of witnesses are almost always subscribed.(*h*) Negotiable paper, too, passes from hand to hand in constant circulation, and hence its purity needs to be guarded by even stricter penalties and nicer circumspection than bonds, which are generally confined to the custody of one person.(*i*)

The rule avoiding written instruments which have been materially altered by the holder rests upon two grounds. The first is, that no man shall be permitted to commit a fraud without running any risk of losing by the event when it is detected.(*j*) This is a reason derived from the policy of the law. The other ground is, that the identity of the instrument has been destroyed. For in a note of hand, the promisor has made a definite written contract. If that contract is afterwards altered in any of its stipulations, the promisor may justly plead, "I never made the contract declared on," and the law cannot compel him to perform a contract he never made. A note materially altered by a holder is useless for any purpose. First, since the note is other than the one which the promisor signed, he is not bound on that instrument. And, secondly, the bill cannot be re-altered at trial to its original state, for parol evidence of what that state was is inadmissible for the benefit of one in privity of knowledge and interest with the alteration.(*k*) Accordingly, a note once issued, and then altered, is void altogether.(*l*)

(*h*) Bank of United States *v.* Russel, 3 Yeates, 391; Master *v.* Miller, 4 T. R. 320, 5 id. 367, 1 Anstr. 225, 2 H. Bl. 141.

(*i*) Stephens *v.* Graham, 7 S. & R. 505.

(*j*) Master *v.* Miller, 4 T. R. 320.

(*k*) This subject is very fully considered in Master *v.* Miller, 4 T. R. 320, 346.

(*l*) In Arnold *v.* Jones, 2 R. I. 345, 349, it is said that the effect of a material alteration is, that "the instrument, so far as the spoliator is concerned, is from that time destroyed and extinguished; its past operation is not counteracted; executed contracts evidenced by it are not rescinded; estates and titles vested by transmutation of posses-

But whenever an instrument has been fraudulently altered, and the only complete remedy for the innocent parties is the restoration of its original terms, parol evidence will be admitted for this purpose.

In the absence of fraud, none but material alterations will vitiate a note or bill; though the old rule was not so discriminating.(*m*) The best test for determining whether an alteration in a note is material or not is to ascertain whether the note would have the same legal effect and operation after the alteration as before.(*n*)

From the preceding pages it will be seen that any alteration which, in any event, may alter a promisor's liability, is material and vitiating, if made without his approbation, and we are not to look to see whether he has actually been prejudiced or not, nor to whether the alteration was designed to benefit, not injure, the party liable.(*o*) So any alteration which changes the evidence or the mode of proof is material, like entries or erasures of the consideration or of witness's name. Wherever neither the rights nor interests, duties nor obligations, of either of the parties are in any manner changed, the alteration is immaterial.(*p*) Though the alteration be actually against the holder's interest, that will make no difference in its destructive effect. But this latter fact furnishes strong evidence to show that it was not wrongfully made.(*q*)

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sion, whether by the common law or the statute, are not divested; but no future benefit can be claimed by that party from the deed, and no warranty, obligations, or other executory contracts, can be enforced by him through its instrumentality." Herrick *v.* Malin, 22 Wend. 388; Barret *v.* Thorndike, 1 Greenl. 73.

(*m*) Trapp *v.* Spearman, 3 Esp. 57. Lord *Kenyon* said, that, to make a bill of exchange void, by reason of an alteration, it should be in a material part; and that, though it had been formerly holden that the even telling up a sum on a bill, or writing anything upon it, would invalidate it, that strictness was now exploded.

(*n*) See the remarks of *Shaw*, C. J., in Wheelock *v.* Freeman, 13 Pick. 165. "An alteration of an instrument is something by which its meaning or language is changed, either in a material or an immaterial particular. If what is written upon or erased from the paper containing the instrument have no tendency to produce this result, or to mislead any person, it cannot be said to be an alteration." Per *Gilchrist*, J., Morrill *v.* Otis, 12 N. H. 466.

(*o*) Gardner *v.* Walsh, 5 Ellis & B. 82.

(*p*) Smith *v.* Crooker, 5 Mass. 538; Brown *v.* Pinkham, 18 Pick. 172

(*q*) Humphreys *v.* Guillow, 13 N. H. 385.

SECTION VI.

FORGERY.

Any material alteration in a note or bill, wilfully made without consent, and subsequent to execution, for the interest of the alterer and against that of the other party, the law will presume to be fraudulent, and will regard as a forgery.(*r*) We will first give a few instances of what have and have not amounted to forgeries of commercial paper, and next consider the effects of payment upon forged paper.

1. *What are not Forgeries.*

Falsely representing that a genuine name on the back of a bill is one's own is not a forgery, but a misdemeanor.(*s*) A false bill, which is made void in form, is not a forged bill; (*t*) though, in England, unstamped bills may subject the forger to the penalties of forgery.(*u*) So a note payable conditionally only will not support an indictment for forging a promissory note.(*v*) So a note payable in cash *or* bank-notes, not being a promissory note, will not support an indictment alleging the forgery of a note.(*w*) For the same reason, a bill drawn payable to ——, or order, with a forged signature, is not technically a forgery, because there is no payee.(*x*) And it has been held no forgery though the blank be filled up; it seems, however, that intent will come in to indicate the payee in criminal as well as civil cases of bills drawn with blanks, and will sustain an indictment for forgery.(*y*)

(*r*) Wheelock *v.* Freeman, 13 Pick. 165.

(*s*) Hevey's Case, 1 Leach, Crown Law, 4th ed. 229, 2 East, P. C. 856.

(*t*) Moffatt's Case, 1 Leach, 4th ed. 431. See State *v.* Humphreys, 10 Humph. 442.

(*u*) Hawkeswood's Case, 1 Leach, 4th ed. 257. This opinion was subsequently disapproved by Lord *Kenyon* in Whitwell *v.* Dimsdale, Peake, 167, but reaffirmed in Gillson's Case, 1 Taunt. 95; and so apparently by *Grose*, J. himself, in Rex *v.* Reculist, 2 Leach, 4th ed. 703. So Rex *v.* Teague, Russ. & R. C. C. 33.

(*v*) Lacy *v.* Woolcott, 2 Dowl. & R. 458.

(*w*) Rex *v.* Wilson, Bayley on Bills, 11.

(*x*) Rex *v.* Richards, Russ. & R. C. C. 193; Rex *v.* Randall, id. 195; Lyon's Case, 2 East, P. C. 933. But a draft made payable *to the bearer*, no payee being named therein, is an order for money within the Michigan statute of forgery. People *v.* Brigham, 2 Mich. 550.

(*y*) Munn *v.* Commission Co., 15 Johns. 44.

A promise to "take this as part payment" does not sustain an indictment for forging a note at common law.(z) So it is with a note without a signature.(a) We must carefully distinguish, therefore, cases of simple fraud from those of forgery.(b)

2. *What are Forgeries.*

Altering or erasing an indorsement on the face of a bill, or on its back, is a forgery, and may be indicted as the forgery of an indorsement.(c) The indorsement of a note by another person of the same name with the real payee or special indorser is a forgery.(d) A false representation by the payee of a note, on passing it over for goods bought, that a certain actually existing person is the maker, is forgery; and it lies on the prisoner to show that another person of the same description was rightfully meant.(e)

There may be forgery, though the signature of the party whose name is used be not forged. Writing a promissory note over the genuine signature of another, not given for that purpose, is a forgery.(f) So uttering or passing a note signed by a person with his own name, as the signature of another person of the same name, if done with intent to defraud of any pecuniary property or right, is forgery.(g) Similar provisions have been expressly enacted by statute in some of the States.(h) Filling up a blank by a clerk, in which his employer had directed him to write a specific sum, with a larger sum, is forgery,(i) though it might bind the master to pay a *bona fide* indorsee for value.

(z) Rex *v.* Burke, Russ. & R. C. C. 496.

(a) Rex *v.* Pateman, id. 455.

(b) Putnam *v.* Sullivan, 4 Mass. 45.

(c) Rex *v.* Bigg, 1 Stra. 17, 18; Yarborough *v.* Bank of England, 16 East, 6, 12; Rex *v* Birkett, Russ. & R. 86. An indorsement of a note is the subject of forgery under the Ohio Act. Poage *v.* State, 3 Ohio State, 229. So Powell *v.* The Commonwealth, 11 Gratt. 822; Cocke *v.* The Commonwealth, 13 id. 750.

(d) Mead *v.* Young, 4 T. R. 28. A note to the order of John P. Reed, a person *in esse*, cannot be indorsed by Joseph P. Reed, from the single fact of being given to the latter for a consideration advanced by him, and not by John P. Bolles *v.* Stearns, 11 Cush. 320.

(e) The King *v.* Hampton, 1 Moody, C. C. 255.

(f) Rex *v.* Hales, 17 State Tr. 161, 209.

(g) Rex *v.* Parkes, 2 Leach, Cr. L., 4th ed. 614.

(h) New York R. S., 3d ed. 761.

(i) Byles on Bills, 262.

And this example may serve in general for blanks wrongfully filled out.

Altering the express place of payment to another is a forgery.(*j*) Appending to one's own name a false addition, as of residence or occupation, so as to make it an accurate description of another person of the same name, is said to be a forgery. But it would seem otherwise if there is no person of the added description.(*k*) Giving a confederate forged notes to utter is forgery.(*l*)

Signing or indorsing a fictitious name has been held a forgery, though some cases have doubted the doctrine.(*m*) It would seem that the mere fact of assuming a fictitious name would not be criminal, unless the signature was invented for the purpose of fraud, and of fraud in that particular instance.(*n*)

Signing an assumed name has been held a forgery, though the party had been known by it for some years; and though the bill would have been as readily taken if signed with the party's real name; or though it was solely taken on the credit of other names thereon. And so has signing a mark to an assumed name, or permitting an assumed name to be put to the mark.(*o*)

If a bill be fatally defective in form, an alteration of it would seem not to be forgery, because it is not the alteration of an instrument by which pecuniary interests can be affected. But if the bill be sufficient in law, it is otherwise, however irregular in form. Thus, a bill for so many "pound" instead of pounds is

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(*j*) Rex *v.* Treble, 2 Taunt. 328.

(*k*) Rex *v.* Webb, Russ. & R. C. C. 405. Selling forged notes, not as genuine, but as forged, even to an agent appointed to detect forgers, who asked for the notes, was considered a forgery under the English statute 45 Geo. III. ch. 89. Rex *v.* Holden, Russ. & R. C. C. 154.

(*l*) Rex *v.* Palmer, Russ. & R. C. C. 72.

(*m*) Rex *v.* Tuft, 1 Leach, 4th ed. 172; Rex *v.* Webb, Russ. & R. C. C. 405, 3 Brod. & B. 228; Rex *v.* Marshall, Russ. & R. C. C. 75; Tatlock *v.* Harris, 3 T. R. 174; Vere *v.* Lewis, id. 182; Rex *v.* Bollond, 1 Leach, 4th ed. 83; Rex *v.* Taylor, id. 214; Minet *v.* Gibson, 3 T. R. 481; Collis *v.* Emett, 1 H. Bl 313; Gibson *v.* Minet, id. 569; Lewis's Case, 2 East, P. C. 957. See Rex *v.* Watts, 3 Brod. & B. 197; People *v.* Fitch, 1 Wend. 198; Colvin *v.* The State, 11 Ind. 361. In this country, in some States at least, a bill payable to a fictitious payee is payable to bearer. Plets *v.* Johnson, 3 Hill, 112. See *infra*, p. 591, note *a*.

(*n*) Rex *v.* Francis, Russ. & R. 209; Dunn's Case, 1 Leach, 4th ed. 57; Rex *v.* Tuft, id. 172; Rex *v.* Peacock, Russ. & R. 278.

(*o*) Rex *v.* Dunn, 1 Leach, Cr. L., 4th ed. 57.

good, and hence its alteration a forgery.(*p*) So it is of a bill for the "sum of fifty," "pounds" being omitted; but "£ fifty" appearing elsewhere on the bill.(*q*)

Uttering a false note payable to the forger's order, which he had not indorsed, is a forgery.(*r*) And so raising the amount has been held a forgery, even where the bill was once paid and reissued.(*s*) But exhibiting to a person false notes, for the appearance of wealth, is not uttering forged notes, nor is it forgery to leave them with him sealed up for the same purpose.(*t*)

An order for the payment of money, though couched as a request, is within the statute of forgery.(*u*) But the forging of a receipt of payment, which has no legal efficacy against the pretended signer, is not within the statute.(*v*) Yet the making of a false entry in the journal of a mercantile firm by a clerk, with intent to defraud his employer, has been held a forgery at common law; as, a false addition of the amount of cash received from bills receivable.(*w*) When a person wrote a note for one sum, and read it to one unable to read as a note for a smaller sum, and procured him to sign it as maker, this was held not to be a forgery.(*x*)

The crossing of a check forms no part of the check itself, and consequently its erasure does not amount to a forgery.(*y*) But the border or ornamental margin of a bank-note has been held to be within the English statutes 11 Geo. IV. § 18, and 1 Wm. IV. ch. 66, against counterfeiting. By the word "note" is not meant merely the obligation or writing, but the whole paper or

(*p*) Rex *v.* Post, Russ. & R. 101.

(*q*) Chisholm's Case, Russ. & R. 297; Elliot's Case, 1 Leach, Cr. L., 4th ed. 175.

(*r*) Rex *v.* Birkett, Russ. & R. 86.

(*s*) Rex *v.* Teague, Russ. & R. C. C. 33.

(*t*) Rex *v.* Shukard, Russ. & R. 200.

(*u*) Evans *v.* State of Ohio, 8 Ohio State, 196; Regina *v.* Dawson, 2 Den. C. C. 75, 1 Eng. L. & Eq. 589.

(*v*) Clarke *v.* State, 8 Ohio State, 630; People *v.* Hoag, 2 Parker, C. C. 36. An indorsement by the cashier or teller on a bank check, that it is good for a given amount, is not, it seems, a writing obligatory, a certificate, or an accountable receipt, in the sense in which these terms are used in the Vermont statutes relating to forgery. Comp. Stat. 551. State *v.* Morton, 27 Vt. 310. See State *v.* Floyd, 5 Strobh. 58.

(*w*) Biles *v.* Commonwealth, 32 Penn. State, 529.

(*x*) Commonwealth *v.* Sankey, 22 Penn State, 390; People *v.* Getchell, 6 Mich. 496. So Regina *v.* Coulson, 4 Cox, C. C. 227, 1 Eng. L. & Eq. 550.

(*y*) Simmons *v.* Taylor, 4 C. B., N. S. 463; Carlon *v.* Ireland, 5 Ellis & B. 765 34 Eng. L. & Eq 130.

thing which circulates as a note.(*z*) But a bank-note not signed by any one as president or cashier will suffice to make the utterer guilty of swindling only, and not of forgery.(*a*)

If a drawer whose name is A. B. C. signs a bill A. B. only, this is not a forgery, unless the surname was left out in fraud.(*b*) And although, in England, since the statute 14 Viet. ch. 100, § 8, it is sufficient in an indictment for forgery to allege that the act was done with intent to defraud, without alleging the intent to defraud any particular person, it is still essential to a conviction that such an intent should be proved.(*c*)

The forging, or causing to be forged, or wilfully assisting in forging or counterfeiting,(*d*) or altering,(*e*) or offering or disposing of (*f*) any bill or note, or an indorsement or assignment thereof, or an acceptance (*g*) thereof, or of a foreign bill or note,(*h*) with intent to defraud any person, or to defraud any corporation,(*i*) was made a capital offence under the earliest English statutes for preserving the integrity of commercial paper. Under these statutes occurred most of the illustrations just given. They have since been reduced and modified considerably as to extent of application, evidence, and penalty, by statutes of the last three reigns. In this country, each State has its statute of forgery, prescribing specifically the offences to which its penalties shall apply. But it is a general rule, that fraudulent intent is essential to constitute the crime of forgery; (*j*) though this intent,

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(*z*) Regina *v.* Keith, 6 Cox, C. C. 533, 29 Eng. L. & Eq. 558.

(*a*) State *v.* Grooms, 5 Strobh. 158.

(*b*) Schultz *v.* Astley, 2 Bing. N. C. 544.

(*c*) Regina *v.* Hodgson, 7 Cox, C. C. 122, 1 Dears. & B. 3, 36 Eng. L. & Eq. 626.

(*d*) 2 Geo. II. ch. 25, made perpetual by 9 Geo. II. ch. 18.

(*e*) 7 Geo. II. ch. 22.

(*f*) 45 Geo. III. ch. 89.

(*g*) 7 Geo. II. ch. 22.

(*h*) 43 Geo. II. ch. 30.

(*i*) 31 Geo. II. ch. 22, 18 Geo. III. ch. 18. For the particulars of these statutes, and the cases under them, including those above selected, see the text-books of Bayley and Byles, and the ninth edition of Chitty; in the tenth, the criminal law of notes and bills has been omitted.

(*j*) Stoughton *v.* State, 2 Ohio State, 562. Under the Georgia Act, however (Pen. Code, Div. 7, s. 12), it has been held unnecessary either to allege or prove a fraudulent intent, for the statute has made the act of alteration a crime. Phillips *v.* State, 17 Ga. 459. If a person passes a note as genuine, knowing it to be forged, the law infers that the intent was to defraud, because it is the natural consequence of the act. Commonwealth *v.* Whitney, Thatcher, Crim. Cas. 588.

it seems, may be inferred even when the work is done so bunglingly as not to deceive a person of ordinary caution.(*k*)

Having thus epitomized some of the earlier and more familiar cases, to indicate what constitutes and what does not constitute a forgery of notes and bills, for the minutiæ of the technical forms of pleading,(*l*) for statute indictments, practice, penalties, and particulars of offence, we must refer the reader to treatises upon criminal law.

3. *Indorsement and Payment of Forged Paper.*

We have elsewhere stated, as a familiar rule of the law of negotiable paper, that whoever puts his name to a note or bill thereby adds his credit to the paper, and, as it were, warrants the genuineness and sufficiency of the preceding signatures. Hence he cannot avail himself, by way of defence, of any forgery which existed upon the note at the time he affixed his signature thereto. It has, indeed, sometimes been asserted, both in treatises and in one or two adjudicated cases, that an indorsement is no warranty of the genuineness of prior indorsements. (*m*)

(*k*) 2 Hale, P. C. 950; Mazagora's Case, Russ. & R. 291; Sheppard's Case, id. 169; Commonwealth *v.* Stephenson, 11 Cush. 481.

(*l*) See Jones *v.* The State, 5 Sneed, 346; Owen *v.* State, id. 493; Fergus *v.* The State, 6 Yerg. 345; State *v.* Crawford, 13 La. Ann. 300; Thompson *v.* State, 30 Ala. 28; Bishop *v.* State, id. 34; Parr *v.* Johnston, 15 Texas, 294; State *v.* Tindal, 5 Harring. Del. 488; People *v.* Stewart, 4 Mich. 655, 5 id. 243; McCartney *v.* State, 3 Ind. 353; Wilkinson *v.* State, 10 id 372; Clark *v.* Commonwealth, 16 B. Mon. 206; State *v.* McKenzie, 42 Maine, 392; State *v.* Brown, 4 R. I. 528; Dennis *v.* People, 1 Parker, C. C. 469; People *v.* Chadwick, 2 id. 163; People *v.* Thoms, 3 id. 256; Mackey *v.* State, 3 Ohio State, 362; Cady *v.* Commonwealth, 10 Gratt. 776; Commonwealth *v.* Wilson, 2 Gray, 70; State *v.* Bonney, 34 Maine, 223, id. 383; State *v.* Crawford, 2 Ind. 23; Johnson *v.* State, id. 652; State *v.* Weaver, 13 Ired. 491; U. S. *v.* Foye, 1 Curtis, C. C. 364; Commonwealth *v.* Miller, 3 Cush. 243; Commonwealth *v.* Taylor, 5 id. 605; State *v.* Hayden, 15 N. H. 355; Perkins *v.* Commonwealth, 7 Gratt. 651; Hart *v.* State, 20 Ohio, 49; Kirby *v.* State, 1 Ohio State, 185; Butler *v.* State, 22 Ala. 43; State *v.* Mix, 15 Misso. 153. The preceding cases contain recent decisions in the various States upon technical formalities in the indictment, &c., in suits upon forged notes or bills. These will, perhaps, show the existing practice, or guide thereto, as well as a larger array of authorities.

(*m*) Bayley on Bills, 5th ed. p. 170; Chitty on Bills, 8th ed. The cases relied upon for both these statements are East India Co. *v.* Tritton, 3 B. & C. 280, *Chambre*, J., *obiter*, in Smith *v.* Mercer, 6 Taunt. 76; neither of which can be regarded as sufficient in point of authority upon this point. Mr. Justice Story, Notes, § 135, note 4, criticises the preceding doctrines and cases thus: "The former case was decided upon an independent ground, that the party accepted the bill with a knowledge of what the agent

But we consider the law as unquestionably settled, that the indorsement of a note or bill warrants the genuineness of all preceding signatures, and not only that, but the genuineness of the note or bill itself.(*n*) For the law will not permit the indorser to deny the validity of the contract which he has assigned, for the purpose of defeating his own liability.(*o*) By his own representations, he has induced his indorsee to take the note, and therefore he is estopped (*p*) from pleading that the representations were untrue. And it is a legal inference from indorsement that the indorser represented the paper and everything within it to be genuine. The principle is perfectly applicable, though the indorser acted *bona fide*, since no rule is more cogent in law than this, that when one of two innocent parties must suffer, it shall be he who unintentionally misled the other.

This principle has been repeatedly applied to cases of forgery. We may infer from it, that *any* transferrer of a note or bill transferable by delivery warrants that it is no forgery.(*q*) If it turns out that the name of one of the parties is forged, and the bill becomes valueless, the vendor, though no party to the bill, becomes liable to the vendee, as upon a failure of consideration. But this distinction has been observed: that the

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authority was, and mistook its legal effect. The latter turned upon the point, that the bill was paid by the plaintiff, as agent of the supposed acceptor, whose acceptance was forged, and both parties were equally innocent; and the plaintiff's name was on the bill."

(*n*) Lambert *v.* Pack, Salk. 127, *nom.* Lambert *v.* Oakes, Ld. Raym. 443, 12 Mod. 244, Holt, 117; Williams *v.* Seagrave, 2 Barnard. 82; Critchlow *v.* Parry, 2 Camp. 182; Free *v.* Hawkins, Holt, N. P. 550; Bruce *v.* Bruce, 1 Marsh. 165; Ogden *v.* Saunders, 12 Wheat. 213. These and similar cases decide that an indorsement "admits" the prior signatures. In Murray *v.* Judah, 6 Cowen, 484, it was said, that an implied warranty of the genuineness of the instrument accompanies the transfer of all negotiable paper. Herrick *v.* Whitney, 15 Johns. 240; Shaver *v.* Ehle, 16 id. 201. So Jones *v.* Ryde, 5 Taunt. 488; Robinson *v.* Yarrow, 7 id 455; Bank of St. Albans *v.* Farmers', &c. Bank, 10 Vt. 141; Marsh *v.* Small, 3 La. Ann. 402; Williams *v.* Drexel, 14 Md. 566; Howe *v.* Merrill, 5 Cush. 80; Veazie *v.* Willis, 6 Gray, 90; Ellis *v.* Wild, 6 Mass. 321; Prescott Bank *v.* Caverly, 7 Gray, 217; Howell *v.* Wilson, 2 Blackf. 418. And see Curry *v.* Kurtz, 33 Missis. 24; Dutton *v.* Tilden, 13 Penn. State, 46; Ellis *v.* Ohio Life Ins. Trust Co., 1 Handy, 97; Weisser *v.* Denison, 6 Seld. 68.

(*o*) Burrill *v.* Smith, 7 Pick. 291.

(*p*) Armani *v.* Castrique, 13 M. & W. 443.

(*q*) Jones *v.* Ryde, 5 Taunt. 488; Bruce *v.* Bruce, 1 C. Marsh. 165; Gurney *v.* Womersley, 4 Ellis & B. 133, 28 Eng. L. & Eq. 256.

transfer without indorsement implies a warranty only where it is parted with in payment of a debt due, or then created, as, for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker, or individual. In such cases, the note being forged, it is no payment, and the original debt or loan may be recovered. But when no debt is due or created at the time, and the paper is sold, as other goods and effects are, there is no warranty of genuineness, and the original debt is discharged. Moreover, the law respecting the sale of goods applies, and the transferrer's title, not the preceding signatures, is the only thing warranted.(*r*)

An acceptance, if made after sight of the bill, admits the drawer's signature, but it does not admit the genuineness of any indorser's, even as to a *bona fide* indorsee for value. Accordingly, if the drawer's signature be forged, the acceptor must, nevertheless, pay the holder, but if he suspects some indorsement to be spurious, he may require the holder to show a clear title through genuine transfers.(*s*) The forgery of an indorser's signature is a good defence to the acceptor, even though it were on the bill at acceptance.(*t*)

The reason of the rule is, that a banker who pays a check, or a drawee who accepts a bill, is presumed to know the hand-

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(*r*) Baxter *v.* Duren, 29 Maine, 434.

(*s*) Smith *v.* Chester, 1 T. R. 654; Price *v.* Neal, 3 Burr. 1354; Leach *v.* Buchanan, 4 Esp. 226; Wilkinson *v.* Lutwidge, 1 Stra. 648; Cooper *v.* Le Blanc, 2 id. 1051; Jenys *v.* Fawler, id. 946; Smith *v.* Mercer, 6 Taunt. 76; Ancher *v.* Bank of England, Doug. 637; Jones *v.* Turnour, 4 Car. & P. 204; Sanderson *v.* Collman, 4 Scott, N. R. 638, 4 Man. & G. 209; Bass *v.* Clive, 4 Maule & S. 13; Wilkinson *v.* Johnson, 3 B. & C. 428; Free *v.* Hawkins, Holt, N. P. 550; Porthouse *v.* Parker, 1 Camp. 82; Macferson *v.* Thoytes, Peake, 20; Bosanquet *v.* Anderson, 6 Esp. 43; Belknap *v.* Davis, 19 Maine, 455; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Goddard *v.* Merchants' Bank, 2 Sandf. 247, 4 Comst. 147; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Bank of St. Albans *v.* Farmers', &c. Bank, 10 Vt. 141; Levy *v.* United States Bank, 1 Binn. 27, 4 Dall. 234; United States *v.* United States Bank, 4 Dall. 235, note; Coggill *v.* Am. Exch. Bank, 1 Comst. 113; Merchants' Bank *v.* M'Intyre, 2 Sandf. 431, 436; Williams *v.* Drexel, 14 Md. 566. A person who procures notes to be discounted at a bank, impliedly warrants the genuineness of the signatures of the makers and indorsers. Cabot Bank *v.* Morton, 4 Gray, 156.

(*t*) Smith *v.* Chester, 1 T. R. 654; Gray *v.* Palmers, 1 Esp. 135; Robinson *v.* Yarrow, 7 Taunt. 455; Jones *v.* Turnour, 4 Car. & P. 204; Beeman *v.* Duck, 11 M. & W. 251; Robarts *v.* Tucker, 16 Q. B. 560, and *supra*, note *s*.

writing of the drawer, his customer. At all events, he is presumed to know it better than a casual indorsee, to whom the bill may come in the course of trade. The acceptor having given such an indorsee cause to rely on the signature cannot afterwards dispute its authenticity. But there is no presumption in the case of an indorsement, the handwriting of which may obviously be perfectly unknown to him. Nor can it be any better known from having been affixed before his own acceptance.(*v*) These rules apply as well to an acceptor *supra* protest as to any other, apparently, though it has been thought otherwise, on the ground that the reason of the rule fails, in the case of one paying for another's honor, since he is not to be presumed to know the other's signature.

This distinction in the drawee's liability has been so strictly drawn, that, if the bill be made payable to the drawer's own order, and indorsed over by him, acceptance admits the drawing, but does not admit the indorsement, though the name is the same, and they profess to be written by the same party.(*w*) It is, however, otherwise when this drawer is fictitious, since he admits the indorsement, if made by the person who wrote the drawer's signature.(*x*) And so, if this signature of drawer, payee, and indorser, all in the same hand, in a check to the drawer's order, be forged, it may be questioned whether the acceptor may set up forgery as a defence.(*y*)

So, if the drawer has drawn to a fictitious payee, and indorsed it over, the acceptor having paid to a *bona fide* holder, cannot recover back his money. And a note with the payee's indorsement forged thereon by the maker is good against the latter in the hands of a *bona fide* holder.(*z*)

The rule, therefore, appears to be, that the parties cognizant of the fact, by implication of fact or law, can be sued by the holder who has taken under the indorsement of a fictitious payee.(*a*)

(*v*) See Story on Bills, §§ 263, 412.

(*w*) Robinson *v.* Yarrow, 7 Taunt. 455; Beeman *v.* Duck, 11 M. & W. 251; Williams *v.* Drexel, 14 Md. 566.

(*x*) Lord *Tenterden*, C. J., in Cooper *v.* Meyer, 10 B. & C. 468.

(*y*) See Beeman *v.* Duck, 11 M. & W. 251.

(*z*) Coggill *v.* Am. Exch. Bank, 1 Comst. 113.

(*a*) A bill payable to a fictitious name or bearer, as, e. g. to "Ship Fortune or

In an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills, payable to fictitious persons.

But it has been sometimes said, that, since the objection is to the forged indorsement solely, it makes no difference whether the acceptor was conusant of the fraud or not, in sustaining an

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bearer," is payable to bearer. Grant *v.* Vaughan, 3 Burr. 1516. If payable to a fictitious person or order, it cannot be indorsed over, because that is a forgery; but it may be sued under such an indorsement by the *bona fide* holder for value. Tatlock *v.* Harris, 3 T. R. 174; Vere *v.* Lewis, id. 182; Minet *v.* Gibson, id. 481, confirmed in House of Lords, 1 H. Bl. 569; Collis *v.* Emett, id. 313; Gibson *v.* Hunter, 2 id. 187. Lord *Ellenborough*, reviewing these cases, held that a bill payable to a fictitious payee cannot be sued upon, either as a bill to bearer or to the plaintiff as *bona fide* indorsee, because the title fails; though if money paid by the holder of such a bill, as the consideration for its being indorsed to him, gets into the hands of the acceptor, it may be recovered back as money had and received. Bennett *v.* Farnell, 1 Camp. 130. But ibid., Addenda, 180 c, it is remarked that the doctrine above is true, "*unless* it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The case is therefore uniform with those first quoted, and by which his Lordship felt bound, "though by no means disposed to give them any extension." See, additionally, Were *v.* Taylor, in argument for defendant, same case. In Hunter *v.* Jeffery, Peake, Add. 146, however, Lord *Kenyon* said that it was too well settled to be disputed, that a *bona fide* holder might recover on such bills as payable to bearer.

In this country, a bill payable to a fictitious payee is generally held payable to bearer. Plets *v.* Johnson, 3 Hill, 112. At common law, a holder must have been ignorant of the fiction to recover of the acceptor, though the latter knew of it. Hunter *v.* Jeffery, Peake, Add. 146. But it is otherwise under the New York statute, which makes a bill payable to a fictitious payee payable to bearer. 2 R. S., 3d ed. 53; Stevens *v.* Strang, 2 Sandf. 138; Willets *v.* The Phœnix Bank, 2 Duer, 121. The ground of the American decisions is, that a drawee accepting a bill looks only for remuneration to the drawer. Hence, the fact that the payee is fictitious will not injure his remedy over, and he may therefore pay to bearer. It is settled, also, as we have said, both in this country and in England, that an innocent holder for value of a note, containing a fictitious payee, or a payee who is not at all concerned, either in the property or transfer of the note, or of any of the notes which have been found analogous to these, has a good title in the note, and if the acceptors pay it, they cannot recover the money. See further, to the same point, Hortsman *v.* Henshaw, 11 How. 177; Meacher *v.* Fort, 3 Hill, S. Car. 227; Foster *v.* Shattuck, 2 N. H. 446; Cooper *v.* Meyer, 10 B. & C. 468; Gompertz *v.* Bartlett, 2 Ellis & B. 849; Chenot *v.* Lefevre, 3 Gilman, 637; Morgan *v.* Bank of New York, 1 Duer, 434, affirmed 1 Kern. 404; Wilcox *v.* Beal, 3 La. Ann. 404; Smith *v.* Mechanics', &c. Bank, 6 id. 624; Laborde *v.* Consolidated Association, 4 Rob. La. 190; Etting *v.* Commercial Bank, 7 id. 459; Vaubibber *v.* Louisiana Bank, 14 La. Ann. 481. In the latter case it was decided that a bank is liable to the payees of a check made payable to their order, when the check is paid on a forged indorsement, made by the collector of the payees, who received the check in payment of an account intrusted to him for collection.

action on the bill. For in no case can title be had under a forgery. Hence, though the *bona fide* indorsee might undoubtedly have an action of indemnity against the fraudulent parties, it might not be sustainable on the bill itself, though, as we have seen, the bill might be evidence in such a case. The course of adjudication, however, seems to have been clearly settled the other way.(*b*)

If the acceptor's own name is forged, and upon presentation he sees his name, and gives the holder in payment another bill, of the same amount, and afterwards finds the first acceptance a forgery, it is no defence to a suit on the second bill.(*c*) But the reason of this rule is, that the acceptor has confirmed the forgery by his act. The holder may have been prejudiced by being prevented from at once tracing out and detecting the forger, and thus making good his loss. The acceptor is thus by his own act estopped from denying the name. Ordinarily, of course, any party may deny his own signature; and if it was not made by him, or by his authority, and has not been adopted or confirmed by him, the defence is available. But he cannot allege the forgery of his acceptance after having himself pronounced it genuine to a purchaser who bought it on his assurances, or whenever he has in any way, by treating it as genuine, assisted its negotiation.(*d*) The holder of a bill, the acceptance of which has been forged by an indorser, having returned it to the latter and received a new bill, may recover on the latter, unless he has agreed with him not to prosecute the forgery.(*e*)

Authority to draw, make, or indorse a bill may, of course, be given to an agent. Where the agent signs the name of his principal without authority, and with malicious intent, it is a

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(*b*) *Supra*, note *a*.

(*c*) Mather *v.* Maidstone, 1 C. B., N. S. 273, 37 Eng L & Eq. 335. Cancellation of a check is, by usage, an evidence of intent to pay it. Fernandey *v.* Glynn, 1 Camp. 426, note. But it is not binding, and when done by mistake, may be explained away. Raper *v.* Birkbeck, 15 East, 17. It would seem, therefore, that if a banker should score across a check, and afterwards discover a forgery thereon, this act in itself would not bar any of his rights, although other circumstances, as delay, &c., might have that effect.

(*d*) Leach *v.* Buchanan, 4 Esp. 226; Cooper *v.* Le Blanc, 2 Strange, 1051; Beeman *v.* Duck, 11 M. & W. 251.

(*e*) Wallace *v.* Hardacre, 1 Camp. 45.

forgery. An acceptance admits the authority of the drawer's agent to draw, but not of any party's to indorse.(*f*)

If the acceptor prove that his signature was forged, yet if it be replied and proved that he has been accustomed to pay similar drafts of the party forging, knowing the forgery, he will be liable to pay this bill also, having adopted such acceptances.(*g*) The same rule has been applied to forged indorsements on promissory notes.(*h*) The question of express or implied consent in all cases is to be put to the jury, it being a question of fact.(*i*) But where a new bank is substituted for an old one, of the same name, place of business, &c., and it is sought to make them liable on the latter's bills, actual issue of such bills must be shown, or they will not be held.(*j*)

We have seen that if a bank accepts notes as its own, and credits them as cash to a *bona fide* holder, who pays them in, it cannot afterwards set them up as forgeries, for it is obliged to know its own bills.(*k*)

A clerk who signs bank-notes need not have the authority of the bank under seal. So the signature of a partner, or of a servant, purporting to be on the partnership or master's account, is the signature of the partnership or master, if an authority, written or parol, or by subsequent assent, or by usual employ, be shown, even after the servant's discharge, or the dissolution of the partnership, until this fact becomes known to the party interested, or is generally known. In Louisiana, it is not necessary to prove the signature of the defendant, unless he deny it specially,(*l*) nor in Kentucky, by statute, unless he deny it on oath.(*m*)

We have seen, that, if there be a forgery upon the note or bill, any party prior to the forgery may defend himself upon it

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(*f*) Weisser *v.* Denison, 6 Seld. 68.

(*g*) Barber *v.* Gingell, 3 Esp. 60.

(*h*) Hartford Bank *v.* Hart, 3 Day, 491.

(*i*) Weed *v.* Carpenter, 10 Wend 403.

(*j*) Wyman *v.* Hallowell & Augusta Bank, 14 Mass. 58. In this case the bank had the same name, president, cashier, and received and issued notes of the former company, the officers frequently declaring that there was no difference between the new bills and the old.

(*k*) United States Bank *v.* Bank of Georgia, 10 Wheat. 333.

(*l*) Miller *v.* Cohea, 1 La. 486.

(*m*) Frazier *v.* Harvie, 2 Littell, 180.

against a holder who must make title through the forgery. If, for example, the note was not made payable to bearer, and has not become so by some indorsement in blank, a holder who sues the maker or an early indorser must make out his title through the indorsements, and obviously if one of these be forged, he has no title. So if there be an indorsement in blank after a forged indorsement, this gives no title, because the indorser in blank had no right except under the forged indorsement, which gave no title at all. If a note payable to A or order be indorsed in blank by him, a subsequent holder may reject any intermediate special indorsement, and claim title by mere possession.(*n*) But if indorsed specially by the payee, and then in blank, the first two indorsing signatures must be genuine, because otherwise there was no authority for the indorsement in blank.(*o*)

It follows from the preceding principles, that a banker, or an acceptor, or drawee, or maker, who pays a note to one who holds it only by a forgery, has no defence against the claim of one to whom the note was legally payable. There is some ground, certainly, at first, for querying whether an acceptor's *bona fide* payment to such an indorsement should not operate as a discharge; and whether such an effect would not be more in consonance, than the prevailing rule, with the fundamental principle, that mercantile paper must be circulated as freely as possible. But the very analogy of the negotiable paper to cash shows us the reason of the rule above. For as payment or transfer of counterfeit coin is null and void, so must the taking or paying forged paper be held no discharge. Accordingly, he who pays a forged note must be on his guard that the indorsement is genuine. The forgery is itself the fatal defect of the instrument, and it makes no difference whether the holder forged the note or gave the value on its face in innocence of the forgery.

It is, therefore, only in case of a genuine bill payable to bearer, or properly indorsed in blank, that the maker can pay to any holder, whether lawful or not, and be discharged there-

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(*n*) Watervliet Bank *v.* White, 1 Denio, 608.

(*o*) In Bosanquet *v.* Anderson, 6 Esp. 43, it was held that, in an action by the indorsee of a bill of exchange, where several indorsements have taken place, which are laid in the declaration, although they must usually be proved, yet, if defendant applies for time to the holder, and offers terms, it is an admission of the holder's title, and a waiver of proof of all the indorsements except the first.

by.(*p*) If the bill be to A or A's order, the acceptor is bound to ascertain that the person so presenting is the one entitled to receive payment. And if he be deceived, the real owner of the bill may recover its amount again from the acceptor, maker, or banker.(*q*) A familiar instance of this is payment by a banker of a check on which the signature is forged, or on which the sum has been fraudulently increased, the maker of the check not being in fault; for such alterations are forgeries, and the bank cannot charge the check as paid for the drawer.(*r*)

By the late English statute, if a banker make payment to any person presenting a draft or check to order on demand, with an indorsement thereon which *purports* to be that of the payee, it is an authorized payment, and he is discharged thereby.(*s*) But other bills and notes, except checks, follow the common-law rule.(*t*) It is an obvious inference, that parties liable on mercantile paper, payable at a future day, run some hazard of forgery by paying before the claim falls due.(*u*) In the in-

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(*p*) See chapter on Lost Notes.

(*q*) The following notice is posted in some of the Boston Banks: "Resolved, that the associated banks recommend to the several banks to instruct their respective tellers to refuse to pay all checks presented at the counters of the banks of this city, except to some person known to the teller, or to some officer of the bank, or known by said teller to be a proper person to receive payment therefor; and to continue to refuse such payment until satisfactory evidence has been furnished him that the holder of the check is entitled to draw the money from the bank. The above resolution, having been adopted by the banks in this city, the teller of this bank is requested to conform thereto. Boston, July 9, 1860." It is the ordinary custom of bankers in some places thus to inquire into the title of holders; but we should doubt whether a non-compliance with it would be held gross negligence.

(*r*) Cocks *v.* Masterman, 9 B. & C. 902; United States Bank *v.* Bank of Georgia, 10 Wheat. 333; Canal Bank *v.* Bank of Albany, 1 Hill, 287. In Hall *v* Fuller, 5 B. & C. 750, a check was drawn by a customer upon his banker for a certain sum, and afterwards altered by the holder, who substituted therein a larger sum, but in such a manner that no person in the ordinary course of business could detect it, and the banker paid the larger sum. The court held that he could not charge the customer for anything beyond the sum originally drawn. *Bayley*, J. said: "The banker, as the depositary of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer; and, to justify the payment, he must show that the order is genuine, not in signature only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the check."

(*s*) 16 & 17 Vict. ch. 59, § 19.

(*t*) Robarts *v.* Tucker, 16 Q. B. 560.

(*u*) De Silva *v.* Fuller, Chitty on Bills, 9th ed. 260; Cripps *v.* Davis, 12 M. & W. 159.

terval elapsing before maturity, the forgery might perhaps have been detected, and the burden of a double payment avoided.

It is said that if the holder agree not to sue the acceptor, provided he makes affidavit that the acceptance is a forgery, the acceptor cannot be sued after making such affidavit, though he perjure himself in so doing; (*v*) but we have some doubts of this.

An exception to the liability again of an acceptor paying a forgery occurs, like that in the cases of fraud, when the forgery or alteration may be attributed to the fault or negligence of the drawer or other party whose name is forged or whose check is altered. The rule, as stated by the early cases, is this: that where a bill is drawn so carelessly as to admit of an alteration in the sum without detection, and the banker pays the larger sum, he may debit his customer with the larger sum, since the customer was alone to blame.(*w*) But if the alteration be so bungling as to cause any party of ordinary diligence to suspect its authenticity, one who takes it will have great suspicion thrown on his title. If his negligence is glaring, a jury may be led to find it fraudulent. But still the rule now prevailing would apply, and gross negligence, though an evidence of fraud, would not be regarded as fraud in itself, or the equivalent of fraud.(*x*)

As money paid under a mistake of fact may always be recovered back, one who pays money on forged paper, by discounting or cashing it, for example, can always recover it back, provided he has not contributed to the mistake himself, materially, by his own fault or negligence, and provided that, by an immediate or sufficiently early notice, he has enabled the party to whom he paid it to indemnify himself as far as possible.(*y*)

In some cases it seems to have been thought that the recovery can be had only by giving notice within "a reasonable time" to the party who has been paid. But perhaps it may be added that,

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(*v*) Stevens *v.* Thacker, Peake, 187.

(*w*) Young *v.* Grote, 4 Bing. 253; Pagan *v.* Wylie, Ross, Bills, 194; Morrison *v.* Buchanan, 6 C. & P. 18. In Orr *v.* Union Bank, 1 Macq. H. L. Cas. 513, 29 Eng. L. & Eq. 1, it was held that payment on a forged check or order is no payment at all, as between the party paying and the person whose name is forged. But in some cases such payment may be made valid by reason of collateral matters, as when a forgery has been successfully accomplished by reason of the want of due caution on the part of the person whose name is forged.

(*x*) See chapter on Lost Bills and Notes.

(*y*) Corbett *v.* State of Georgia, 24 Ga. 287.

even where a considerable interval has elapsed, the mere space of time is not important, provided it be clearly shown that the holder will be put to no more liability, trouble, or expense by a restoration now, than if it had been called for on the day of payment.

If, however, the bank paid the money in utter carelessness, and the person receiving it gave a value for the check which he cannot now recover back, or if the bank did not pay it in carelessness, but has carelessly delayed a notice until the payee has lost an opportunity of indemnity which an earlier notice would have given, it would seem to be certain, on general principles, that the bank cannot recover back the money it has paid.

As to what is a reasonable time for the party paying to give notice of the forgery, there has been considerable difference of opinion. In the earlier cases it was strictly held, that the payor cannot recover back the money unless he gives notice on the very day of payment, and before any change of circumstances.(*z*) A delay until the day after is fatal. And the same strict rule was imposed upon one who pays for honor.(*a*) In the first case, "a considerable delay" was held fatal; (*b*) in another, seven days was fatal; (*c*) in another, a fortnight; (*d*) in another, eighteen days; in another, ten days; (*e*) and another, fifteen days.(*f*) But where the notice was given on the very day when payment was made, and so as to enable the party paid to send notice of the dishonor to the prior parties on that day, and none of the parties was discharged or affected, the money was considered recoverable; (*g*) and not otherwise.(*h*)

In this country, however, the strict English rule has been, in

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(*z*) Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390; Smith *v.* Chester, 1 T. R. 654; Smith *v.* Mercer, 6 Taunt. 76; Cocks *v.* Masterman, 9 B. & C. 902; Wilkinson *v.* Johnson, 3 id. 428.

(*a*) Wilkinson *v.* Johnson, 3 B. & C. 428. But in Ancher *v.* Bank of England, 2 Doug. 637, money paid in honor of a bill with a forged indorsement was recovered back, though it did not appear that notice was given on the day of payment. *Buller*, J., dissenting.

(*b*) Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390.

(*c*) Smith *v.* Mercer, 6 Taunt. 76.

(*d*) Davies *v.* Watson, 2 Nev. & M. 709.

(*e*) Ellis *v.* Ohio Life Ins. & Trust Co., 1 Handy, 97.

(*f*) Gloucester Bank *v.* Salem Bank, 17 Mass. 33. So Pope *v.* Nance, Minor, 299

(*g*) Such was the fact in Wilkinson *v.* Johnson, 3 B. & C. 428.

(*h*) Cocks *v.* Masterman, 9 B. & C. 902.

some cases, though by no means all, repudiated, and a payor allowed any reasonable time after payment to detect a forgery, and demand restitution. According to these cases, what that reasonable time is will depend on circumstances. At all events, it is not necessarily the very day of payment, nor the day after. For one who passes a forged bill cannot, it is said, avoid his liability, on pretence of delay in detecting the forgery, and giving notice; and reasonable diligence is all that can be required. Hence, where no negligence is imputable to the drawee in failing to detect the forgery, want of notice thereof within the time which ordinarily charges previous parties on negotiable paper is excused, provided it be given to the holder as soon as the forgery is discovered.(*i*)

It is obvious, that, whenever persons who have not, in the view of the law, authenticated a forged signature, pay thereto, for example, when an acceptor pays to one who holds by a forged indorsement, they may recover the money, wherever, at least, they do not prejudice the rights which the holder may have on giving notice to precedent parties; and even this last condition cannot be regarded as a prerequisite in some cases.

But it might be expected, from what was said in the early part of this section, that no payor can recover money paid on the forged signature of a prior party. For if one warrants a preceding signature he may be considered as estopped from asserting its invalidity; that is, he would be bound to pay, even if he had discovered at the time of payment that the signature was a forgery. Thus, since an acceptor is presumed to know the handwriting of his drawer, it would seem to follow as a matter of course, that, having once paid a forged draft to a *bona fide* holder for value, he could not recover the money on discovering the forgery, but must bear the loss. If this be not the meaning of the presumption, it is difficult to say what the meaning is. Such, indeed, was the inference drawn in the early cases.(*j*) But the later cases in England have vested the right of recovering back solely upon the question of delay in giving notice, and allow one

(*i*) United States Bank *v.* Bank of Georgia, 10 Wheat. 333; Canal Bank *v.* Bank of Albany, 1 Hill, 287, 292; Bank of Commerce *v.* Union Bank, 3 Comst. 230. See, *contra*, the cases in notes *z* and *f*, *supra*.

(*j*) Price *v.* Neal, 3 Burr. 1354, 1 W. Bl. 390; Smith *v.* Chester, 1 T. R. 654; Smith *v.* Mercer, 6 Taunt. 76, 1 Marsh. 453.

who has paid to a forged order of his customer to recover the money back, if in season.(*k*)

We have already seen that payment in forged bills or notes is no payment, except where the payee expressly or impliedly takes the risk of forgery. And a sale, exchange, or discount of forged notes does not prevent the buyer from recovering his money, on finding the notes different from what they purport to be. For the transferrer of a note or bill transferable by delivery warrants that it is genuine, and no forgery.(*l*)

As a bank must know its own paper, and hence an innocent payment to a bank in its own forged notes has been held a good payment,(*m*) so if a person present a forged acceptance to the pretended acceptor, who, believing that it is his own, give another one in discharge of the former, we have seen that the party so receiving the second bill has a good claim thereon ; but he must prove himself a holder for value.(*n*) In France, it would seem that a payment to a *bona fide* holder of a forged draft cannot be recovered at all, even by immediate notice, except only when it is made for the honor of the indorsers, and the last indorse-

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(*k*) Chitty on Bills, ch. 9, p. 430 and following pages. In McKleroy *v.* Southern Bank of Ky., 14 La. Ann. 458, the decision was, that the acceptance of a bill admits the drawer's signature, and where an acceptor has paid to a *bona fide* holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid. But where a party became the holder of such a draft, before it has been accepted, and where the loss had already attached, it was accepted and paid, and the acceptors, immediately upon ascertaining the fact of the forgery, gave notice of this fact to the holders. Held, that such a case is an exception to the general rule, and the acceptors are not estopped from proving the forgery, and recovering the money they had paid through error. The court, after citing a portion of the quotation from Chitty, said: "The facts in this case afford the distinction to which Mr. Chitty refers, and take the case out of the general rule. . . . . And we have no hesitation in reversing the judgment, upon the authority of Mr. Chitty, above quoted."

(*l*) Jones *v.* Ryde. 5 Taunt. 488 ; Bruce *v.* Bruce, id. 495, 1 C. Marsh. 165 ; Wilkinson *v.* Johnson, 3 B & C. 438; Gurney *v.* Womersley. 4 Ellis & B 133, 28 Eng. L & Eq 256 ; Fuller *v* Smith, Ryan & M 49 ; Ramsdale *v* Horton, 3 Penn. State, 330 ; Anderson *v* Hawkins, 3 Hawks, 568; Hargrave *v.* Dusenberry, 2 id 326; Morrison *v.* Currie, 4 Duer, 79; Ellis *v.* Wild, 6 Mass. 321 ; Young *v.* Adams, id. 182 ; Strange *v* Ellison, 2 Bailey, 385; Thomas *v* Todd, 6 Hill, 340; Simms *v.* Clark, 11 Ill. 137 ; Eagle Bank *v.* Smith, 5 Conn. 71 ; Morgan *v.* Bank of New York, 1 Duer, 434, affirmed 1 Kern. 404 ; Markle *v.* Hatfield, 2 Johns. 455 ; Herrick *v.* Whiting, 15 id. 240; Murray *v.* Judah, 6 Cowen. 484 ; Thrall *v* Newell, 19 Vt. 202 ; Cabot Bank *v.* Morton, 4 Gray, 156 ; Aldrich *v.* Jackson, 5 R. I. 218 ; Shaver *v.* Ehle, 16 Johns. 201 ; Mudd *v.* Reeves, 2 Harris & J. 368 ; Merrium *v.* Wolcott, 3 Allen, 258.

(*m*) United States Bank *v.* Bank of Georgia, 10 Wheat. 333.

(*n*) Mather *v.* Maidstone, 1 C. B., N. S. 273.

ment, or that to the holder, is not forged.(*o*) This doctrine appears to recognize the other, that the acceptor is estopped from pleading the forgery under any circumstances against a *bona fide* holder.

In the case of forged bank-notes, it is certain, from the cases last cited and others, that the money or the goods given for them may be recovered at any time, without reference to the question whether the forgery was immediately or seasonably discovered, and notice immediately given.(*p*) In England, certain other instruments, namely, navy-bills (*q*) and victualling-bills (*r*) have received the same determination, the ground taken being their analogy to bank-bills. So a drawee or acceptor may recover the money he pays on a bill forged in its body, e. g. by increase of the sum, change in time of payment, &c., because he is answerable only for the drawer's signature. But he must not be guilty of carelessness in not noticing a forgery which ordinary attention must have disclosed at once.(*s*) In any event, whether the bill be forged in the body or the signature, and whether he recovers or not, the acceptor cannot charge his customer with the amount, as we have already said. The owner of the money paid on the forged indorsement may recover either of the acceptor or the holder, but in the latter case, of course, the recovery would be a bar to a similar suit of the acceptor's against the holder.

The value paid for forged notes may be recovered from any party warranting them, either expressly or by implication of law. But a vendor who agrees to receive for his goods, not money, but certain existing notes, indorsed by third persons in full payment, runs the risk of forgery. And so, wherever this risk is run, the money cannot be recovered back ; and a transferrer by mere delivery of a note payable to bearer is clearly no party thereto, and can only be made liable for a forgery to his immediate transferee.(*t*)

(*o*) 2 Pardes., Nos. 451 – 453.

(*p*) But in Simms *v.* Clark, 11 Ill. 137, the general proposition seems to be held, that a party who innocently pays away a counterfeit bill is not bound to take it back, unless it is returned within a *reasonable* time after it is discovered to be spurious. And so see Thomas *v.* Todd, 6 Hill, 340, and cases cited.

(*q*) Jones *v.* Ryde, 5 Taunt. 488.

(*r*) Bruce *v.* Bruce, 5 Taunt. 495 ; Wilkinson *v.* Johnson, 3 B & C. 428.

(*s*) Bank of Commerce *v.* Union Bank, 3 Comst. 230.

(*t*) Fenn *v.* Harrison, 3 T. R 757 ; Emly *v.* Lye, 15 East, 7 ; Ex parte Shuttle-

Recovery of money paid under a forgery of signature has been made the subject of express legislation in some States.(*u*)

In a suit to recover money paid for a forged note, which had been taken without indorsement, it has been held no estoppel that the purchaser had obtained to his use a judgment against the ostensible maker in favor of the supposed payee.(*v*)

SECTION VII.

SET-OFF.

SET-OFF was originally unknown to the common law,(*w*) but was long since recognized and applied in equity; and now that it is used in our courts of law, the equitable principles originally applied to it still attach, except where they are controlled or qualified by statutory provisions.(*x*) In England, until recently, set-off was only the elimination or defeat of one demand by an opposite demand; and if this opposite demand were greater, the defendant must sue separately for his balance. So too it resulted that a plea of set-off was of no avail, unless the defendant proved that his claim was fully equal to the plaintiff's.(*y*) But

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worth, 3 Ves. 368; Ellis *v.* Wild, 6 Mass. 321; Ward *v.* Evans, 2 Ld. Raym. 928; McKleroy *v.* Southern Bank of Kentucky, 14 La. Ann. 458; Fisher *v.* Rieman, 12 Md. 497; Baxter *v.* Duren, 29 Maine, 434, and cases there cited; *supra*, p. 590, note *s*. In Fisher *v.* Rieman, 12 Md. 497, the question was discussed at much length, and with careful collation of authorities. It was held, that, when a note is *bona fide* sold by a public bill and note broker by delivery merely, without indorsement or any express warranty or representation, the broker acting as agent, but not disclosing the name of his principal, and no debt being due the purchaser or created at the time, the latter cannot recover from the broker the money paid for the note, though the names of the maker and one of the indorsers thereon proved to be forgeries. In such case there is no implied warranty of the genuineness of the note, but the law respecting the sale of goods is applicable. The only warranty is that of title. But see Merriam *v.* Wolcott, 3 Allen, 258.

(*u*) Laws of Pennsylvania, 1849. The subject of forged indorsements has been treated of somewhat under "Lost Notes."

(*v*) White *v.* Green, 5 Jones, 47.

(*w*) White *v.* The Governor, 18 Ala. 767; Meriwether *v.* Bird, 9 Ga. 594.

(*x*) Since the doctrine of set-off was borrowed from the civil law, it should be interpreted by principles of construction drawn from that law. Meriwether *v.* Bird, 9 Ga. 594.

(*y*) Cousins *v.* Paddon, 2 Cromp. M. & R. 547; Tuck *v.* Tuck, 5 M. & W. 109; Moore *v.* Butlin, 7 A. & E. 595. These cases made set-off an indivisible plea.

now, by statute, the defence may be for part, and the plaintiff's claim will be reduced *pro tanto*.(z) In this country, if the set-off be duly filed and proved, and it meets the whole claim of the plaintiff, and there is a balance overdue to the defendant, he may, generally at least, have judgment and execution for it.(a)

It would be out of place to attempt to give here a general outline of the whole law of set-off. But we will endeavor to present those of its principles which are most frequently applicable to promissory notes and bills of exchange.

In the first place, the law of set-off does not apply to negotiable notes or bills, in actions between distant parties.(b) But it does apply between immediate parties, and, wherever the bills are negotiated after dishonor,(c) between remote parties also; and to any transferee of a note or bill not negotiable.(d) In England, the indorsee of an overdue note or bill is liable to such equities as attach to it in itself, but only to such, and not to those arising out of collateral matters, nor to any set-off that is not good against his indorser. And so at common law in this country, in some States, at least, it is held that not all equities

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(z) 15 & 16 Vict., ch. 76, § 75; Wilkinson *v.* Kirby, 15 C. B 430.

(a) Grogan *v.* McMahon, 4 E. D. Smith, 754; Edington *v.* Pickle, 1 Sneed, 122; Concord *v.* Pillsbury, 33 N. H. 310.

(b) See Parker *v.* Kendall, 3 Vt. 540; Emanuel *v.* Atwood, 6 Port. Ala. 384.

(c) In Ordiorne *v.* Woodman, 39 N. H. 541, the maker was allowed to set off a claim against one who took the note after it was discredited, unless the indorsee could show that he took the note *bona fide*, and for a valuable consideration.

(d) Burkett *v.* Moses, 11 Rich. Law, 432. But if a non-negotiable note is assigned, and the maker expressly promises the assignee for value to pay the face of the note, he cannot, when the latter sues in the name of the payee, set off claims and equities which might have availed against the payee. Wiggin *v.* Damrell, 4 N. H. 69. Such a promise of the maker to refrain from set-off need not, apparently, be in express terms. If the maker, on being notified before the maturity of the assignment of the non-negotiable note by the assignee, and merely reply that he will attend to it, but says nothing of set-off, he has been prevented from afterwards setting up claims against the payee, in an action in the latter's name. Albee *v.* Little, 5 id. 277. See Thompson *v.* McClelland, 29 Penn. State, 475. But in such cases the defendant, seeking to set up a set-off to the non-negotiable chose in action, must show that the claim belonged to him before notice of the assignment. Soloman *v.* Holt, 3 E. D. Smith, 139. The mere possession of the notes used as cross demands on trial is no evidence of the time when they were purchased, and it must be shown affirmatively by the defendant that he had them at the time the plaintiff commenced his action. Speers *v.* Sterrett, 29 Penn. State, 192; Wilson *v.* Reaves, 4 Sneed, 173. If the note be in the defendant's possession at the commencement of the suit, but not then assigned, it cannot be a set-off, though afterwards and before trial assigned. Bishop *v.* Tucker, 4 Rich. 178.

which might be set off against the original payee can be set off against a third party who is affected with constructive notice of set-off, but only those attaching to the particular note in suit.(*e*) But in other States, as in Massachusetts, for example, any set-off to a note which would have been good between the original parties is good also against an indorsee after maturity, as well as a payment of the note itself. He takes it subject to any right of set-off which the maker had against any prior holder. Provisions for securing set-offs of independent and collateral claims are expressly secured in not a few of the States by statutes; and we may therefore conclude that the English rule above referred to is not the law in most of the United States.(*f*)

In several of our States, the statutory or customary law qualifies materially the privileges which belong to indorsees by the law merchant. In general, one who takes negotiable paper before the last day of grace, for value, with a knowledge of claims which the maker has against his indorser, and might set off against his indorser, is unaffected by them.(*g*) But in some States, any indorsee is subject to all such preceding offsets, and in some he may by statute be subjected to offsets which he did not know.(*h*) In such States, notes are often found payable in

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(*e*) Chalmers *v.* Lanion, 1 Camp. 383; Burrough *v.* Moss, 10 B. & C. 558; Banks *v.* Colwell, cited in Brown *v.* Davies, 3 T. R. 80; Whitehead *v.* Walker, 10 M. & W. 696; Cripps *v.* Davis, 12 id. 159; Oulds *v.* Harrison, 10 Exch. 572; Stein *v.* Yglesias, 1 Cromp. M. & R. 565; Goodall *v.* Ray, 4 Dowl. 76; Hughes *v.* Large, 2 Barr, 103; Wharton *v.* Hopkins, 11 Ired. 505; Renwick *v.* Williams, 2 Md. 356; Tinsley *v.* Beall, 2 Kelly, 134; McAlpin *v.* Wingard, 2 Rich. 547; Gullett *v.* Hoy, 15 Misso. 399; Hankins *v.* Shoup, 2 Ind. 342; Metcalf *v.* Pilcher, 6 B. Mon. 529; Haxtun *v.* Bishop, 3 Wend. 13; Bridge *v.* Johnson, 5 id. 342; Johnson *v.* Bridge, 6 Cowen, 693; Wheeler *v.* Raymond, 5 id. 231; Bank of Niagara *v.* M'Cracken, 18 Johns. 493; Kennedy *v.* Manship, 1 Ala. 43.

(*f*) Peabody *v.* Peters, 5 Pick. 1; Stockbridge *v.* Damon, id. 223; Sargent *v.* Southgate, id 312; Braynard *v.* Fisher, 6 id. 355; Grew *v.* Burditt, 9 id. 265; Shirley *v.* Todd, 9 Greenl. 83; Baxter *v.* Little, 6 Met 7; Pettee *v.* Prout, 3 Gray, 502; Bond *v.* Fitzpatrick, 4 id. 89; Martin *v.* Trobridge, 1 Vt. 477; Savage *v.* Davis, 7 Wend. 223; Furniss *v.* Gilchrist, 1 Sandf. 53; Hedges *v.* Sealy, 9 Barb. 214; McKenzie *v.* Hunt, 32 Ala. 494.

(*g*) Pettee *v.* Prout, 3 Gray, 502; Wheeler *v.* Guild, 20 Pick. 545.

(*h*) A held a note against B, which was assigned after maturity. In a suit by the assignee against B, a note which B held against A with another obligor, C, was a good set-off. Hurdle *v.* Hanner, 5 Jones, 360. But the administrator of the maker, in a suit by an assignee after maturity, cannot set off a note made to his intestate by the payee of the note sued upon, and sold and delivered by the intestate in his lifetime to the defendant, though no formally indorsed to the defendant. Stickney *v.* Clement,

terms "without defalcation," the effect of which is to bind the maker not to set up any equitable defences against the holder, but to pay him the full amount absolutely and at all events. Yet even in this case, though ordinarily the indorsee of a note "payable without defalcation" is not exposed to set-off, an exception has been made, where he took it with full notice of such a claim pending against the payee from the maker.(*i*)

No debt or claim can be set off, unless it is a legal (*j*) debt,(*k*) subsisting in full force,(*l*) upon which a suit maintainable at law could have been commenced at the time it is filed in offset; and it should be a liquidated (*m*) debt, or one capable of exact

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7 Gray, 170. A note offered in set-off will be presumed *prima facie* to have been acquired before maturity. Crow *v.* Watkins, 12 La. Ann. 845.

(*i*) Lighty *v.* Brenner, 14 S. & R. 127.

(*j*) It must be legal, and not merely equitable. Wake *v.* Tinkler, 16 East, 36; Milburn *v.* Guyther, 8 Gill, 92; McDade *v.* Mead, 18 Ala. 214. And if legal, a set-off may be good against a note or bill, though there be a direct agreement to the contrary. Preston *v.* Strutton, 1 Anstr. 50; Taylor *v.* Okey, 18 Ves. Jr. 180. If A's acceptance come to B's hands, and B buy goods of A without A knowing that B has it, still B may set off the bill against A. Hankey *v.* Smith, 3 T. R. 507, note *a*; Rogerson *v.* Ladbroke, 7 J. B. Moore, 412. And this, although the contract was not to pay ready money for the goods. Cornforth *v.* Rivett, 2 Maule & S. 510.

(*k*) It must not be a mere claim or guaranty. Crawford *v.* Stirling, 4 Esp. 207; Morley *v.* Inglis, 4 Bing. N. C. 58; Williams *v.* Flight, 2 Dowl. N. S. 11. Costs of arbitration are not a proper set-off. Bryant *v.* Clifford, 27 Vt. 664. And the plaintiff must be protected always by the record from another action on the same subject-matter. Stevens *v.* Blen, 39 Maine, 420. The holder of a non-negotiable note, transferred to him by mere delivery, cannot ordinarily and at common law plead it in set-off to an action brought against him by the maker. Ayres *v.* McConnel, 15 Ill. 230. An equitable demand cannot be set off by a garnishee in a court of law against his indebtedness to the defendant. Loftin *v.* Shackelford, 17 Ala. 455.

(*l*) Ryan *v.* Barger, 16 Ill. 28.

(*m*) Bell *v.* Carey, 8 C. B. 887; Luckie *v.* Bushby, 13 id 864, 24 Eng. L & Eq. 256; Hepburn *v.* Hoag, 6 Cowen, 613; De Tastet *v.* Cronsillat, 2 Wash. C. C. 132; Armstrong *v.* Brown, 1 id. 43; Powers *v.* Central Bank, 18 Ga. 658; Moore *v.* Weir, 3 Sneed, 46; Pitts *v.* Holmes, 10 Cush 92; Haynes *v.* Prothro, 10 Rich. Law, 318; Pierce *v.* Hoffman, 4 Wis. 277; Brake *v.* Corning, 19 Misso. 125; U. S. *v.* Williams, 5 McLean, 133; Hall *v.* Glidden, 39 Maine, 445; Johnson *v.* Jones, 16 Misso. 494. And such is the rule under the new code. Mahan *v.* Ross, 18 id. 121; Pratt *v.* Menkens, id. 158; Attwooll *v.* Attwooll, 2 Ellis & B. 23; Smith *v.* Smith, 1 Ind. 476; Crookshank *v.* Mallory, 2 Greene, Iowa, 257. In general, unliquidated damages are not good by way of set-off, either at law or in equity, unless by understanding of the parties, or unless some special case is made out, as the insolvency or non-residence of the plaintiffs. Jordan *v.* Jordan, 12 Ga. 77; Bonand *v.* Sorrel, 21 id. 108. But they have been allowed under the plea of payment, in an action arising from the same transaction, as an equitable defence. Hubler *v.* Tamney, 5 Watts, 51; Gogel *v.* Jacoby, 5 S & R. 117; Elliot *v.* Heath, 14 N. H. 131. And in Pennsylvania and some other States they

and certain definition. But an equitable claim, as by the assignee of a bond or note non-negotiable may be set off, where an exact distinction between law and equity jurisdiction is not maintained.(*n*)

Equity will interfere to allow a set-off, according to some decisions, only on equitable grounds.(*o*) But the party's insolvency is sufficient ground for equity to allow a set-off of one legal demand against another.(*p*) And it has been said that a set-off is procurable in equity, even though the same could be enforced at law, if the latter remedy would be attended with great expense and multiplicity of suits.(*q*) In general, however,

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may be set up in a contract different from that upon which the contract is brought. Speers *v.* Sterrett, 29 Penn. State, 192; Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. 439; Phillips *v.* Lawrence, id. 150; Edwards *v.* Todd, 1 Scam. 462; Kaskaskia Bridge Co. *v.* Shannon, 1 Gilman, 15. Unliquidated damages may be had, under the New York statute (Code, §§ 150, 274), on an action of contract, in any affirmative cause of action, whether it was or was not the subject of recoupment. Ogden *v.* Coddington, 2 E. D. Smith, 317. Damages for breach of contract are unliquidated when no criterion is provided by the parties, or by the law of contracts, for ascertaining the amount of damages. McCord *v.* Williams, 2 Ala. 71; Holley *v.* Younge, 27 id. 203. A demand for unliquidated damages on a breach of covenant of title may be set off in equity against a note founded on an independent consideration, when the vendor is dead, and his estate is insolvent. When a note was left with the plaintiff's intestate by the defendant for collection, and the former converted it to his own use, its amount was held not unliquidated, and therefore a good set-off. Gunn *v.* Todd, 21 Misso. 303. A claim that by calculation can be readily ascertained, is a good set-off under the statute, without previous demand. Spencer *v.* Morgan, 5 Ind. 146; Persons *v.* McKibbin, id. 261. In this case the note was payable in work, to be done by A, but if A did not complete the work, the promisor was to pay the note. A died before completing the work, and the value of the work done was a good set-off to the amount of the note. At law, against a note given for the price of land, damages for breach of covenant in the deed may be set off, if capable of exact computation, but not if uncertain. Drew *v.* Towle, 7 Foster, 412. In Vermont, the offset need not be liquidated, as it must at common law; but the plea there is a mere declaration, and may cover any matter of contract not expressly excepted in the statute. Hubbard *v.* Fisher, 25 Vt. 539. An attorney's fee for services rendered has been held a good set-off, though the amount of the fee had not been liquidated between the attorney and his client. Briggs *v.* Moore, 14 Ala. 433. So with the price of goods delivered, though the price was not agreed on. Smith *v.* Hnie, 14 id. 201. On the other hand, a contract for the delivery of specified articles, the value of which is not fixed by the contract, was not allowed in set-off in Bolinger *v.* Gordon, 11 Humph. 61.

(*n*) Morgan *v.* Bank of North America, 8 S. & R. 73; Beesley *v.* Crawford, 19 Ohio, 126.

(*o*) Naglee *v.* Palmer, 7 Calif. 543.

(*p*) White *v.* Wiggins, 32 Ala. 424; Colyer *v.* Craig, 11 B. Mon. 73.

(*q*) Burns *v.* Hill, 19 Ga. 22.

equity will not allow a set-off where the law would not,(*r*) except when special equities growing out of the transaction itself require it,(*s*) when it will be allowed.(*t*)

A set-off must be mutual; (*u*) and such as to give a simultaneous right of action at the time of the suit brought.(*v*) But if not arising *ex contractu*, nor connected with the subject of the action,(*w*) there is no right of set-off.(*x*) A joint debt cannot be set off against an individual debt, nor the latter against the former.(*y*)

Partnership. — If a firm sue, only a debt from the firm can be set off.(*z*) And if a firm be sued, they can only set off a debt due to the firm.(*a*) But each partner has a right to release or

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(*r*) Courts of equity put the same construction on the statutes of set-off, in the absence of all intervening equities, as do the courts of law. McKinley *v.* Winston, 19 Ala. 301.

(*s*) Lockwood *v.* Beckwith, 6 Mich. 168; Betts *v.* Gunn, 31 Ala. 219; Spear *v.* Dey, 5 Wis. 193; Simmons *v.* Williams, 27 Ala. 507; Black *v.* Whitall, 1 Stockt. 572.

(*t*) Graves *v.* Hull, 27 Missis. 419; Cave *v.* Webb, 22 Ala. 583.

(*u*) Isberg *v.* Bowden, 8 Exch. 852; Attwooll *v.* Attwooll, 2 Ellis & B. 23; Watkins *v.* Zane, 4 Md. Ch. 13; Gibbs *v.* Cunningham, id. 322; Relf *v.* Bank of Mobile, 20 Penn. State, 435; Hilliard *v.* Walker, 11 Ill. 644; Hopkins *v.* Megquire, 35 Maine, 78. It seems that the debts need not be mutual and due in the same right, in order to be set of in case the party against whom the set-off is pleaded is insolvent. Hanchett *v.* Gray, 7 Texas, 549.

(*v*) Pate *v.* Gray, 1 Hempst. 155.

(*w*) A dividend about to come to the defendant as stockholder of a bank, when its affairs are wound up, cannot be set off *pro tanto* even in equity against his note to the bank for borrowed money, except by express agreement. Ruckersville Bank *v.* Hemphill, 7 Ga. 396. So when the claim set up against a note is barred by the statute of limitations, and the debts have no connection with each other, it cannot be set off. Nason *v.* McCulloch, 31 Maine, 158.

(*x*) Crowninshield *v.* Robinson, 1 Mason, 93; Kurtz *v.* McGuire, 5 Duer, 660; Conner *v.* Winton, 7 Ind. 523.

(*y*) Wilson *v.* Keedy, 8 Gill, 195.

(*z*) Ross *v.* Pearson, 21 Ala. 473.

(*a*) The defendant, sued on an individual debt cannot, except by express agreement, set off a debt due to him by open account from a firm of which the plaintiff was a member. Duramus *v.* Harrison, 26 Ala. 326; Mitchell *v.* Sellman, 5 Md. 376. An account accruing on a contract with one partner, but without notice of any partnership, may be set off in an action by the firm. Bryant *v.* Clifford, 27 Vt. 664. The defendant owing the plaintiff individually, cannot, in a suit for that debt, set off a debt due from the plaintiff to a firm in which they are both partners. Land *v.* Cowan, 19 Ala. 297. Where copartners are summoned as trustees, in a trustee process, they may set off a claim due from the defendant to one of the partners. Robinson *v* Furbush, 34 Maine, 509.

discharge a debt due to the firm, and may release it or pay it, by setting off a debt due from himself, although in so doing he acts in fraud of his partners.(*b*) And where a surviving partner, to whom the effects and credit of a firm have come by the death of other partners, sues or is sued, his private and personal debts and claims may now be set off, for he does not sue and is not sued, in a representative capacity, but personally, although he must account with the representatives of the deceased partners.(*c*) But a debt of one partnership to another cannot be set off in a suit in equity brought by the representatives of a member of one firm who has died since contracting the debt, against one member of the other.(*d*) And money due to one of two partners cannot be set off against a demand existing against the partners jointly.(*e*) Pending proceedings for a dissolution of a partnership, and before the decree is made, the firm not having taken the benefit of the insolvent act, a debtor may generally purchase notes against the firm to use as a set-off.(*f*)

Personal Ownership. — It is a general, and indeed universal rule, that if one brings a personal bill, a claim against him in a strictly representative (*g*) capacity cannot be set off.(*h*) So claims against an agent cannot be set off in a debt against his principal.(*i*) But in an action against principal and surety, a demand due from the plaintiff to the principal alone may be set off,(*j*) and so, perhaps, might one due to the surety alone, leav-

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(*b*) Wallace *v.* Kelsall, 7 M. & W. 264.

(*c*) Slipper *v.* Stidstone, 1 Esp. 47; Holbrook *v.* Lackey, 13 Met. 132; Cowden *v.* Elliot, 2 Misso. 60; Lewis *v.* Culbertson, 11 S & R. 48; Meader *v.* Scott, 4 Vt. 26.

(*d*) Reed *v.* Whitney, 7 Gray, 533; Walker *v.* Eyth. 25 Penn State, 216.

(*e*) Pinckney *v.* Keyler, 4 E. D. Smith, 469 See further as to the plea of set-off in case of Partnerships, Sturges *v* Swift, 32 Missis. 239; Anderson *v.* Robertson, id. 241; Evans *v.* Clover, 1 Grant's Cas 164; Ingraham *v.* Foster, 31 Ala. 123.

(*f*) Naglee *v.* Minturn, 8 Calif. 540.

(*g*) A claim of the defendant against the plaintiff individually cannot be set off against a claim due to the plaintiff as trustee for the sale of real estate. Mel'herson *v.* Ross, 1 Md 181.

(*h*) Grew *v.* Burdilt, 9 Pick. 265; Cummins *v.* Williams, 5 J. J. Marsh. 384; Wright *v.* Rogers, 3 McLean, 229; Snow *v.* Conant, 8 Vt. 301.

(*i*) Foster *v.* Hoyt, 2 Johns. Cas. 327; Gordon *v.* Church, 2 Caines, 299; Wilson *v.* Codman, 3 Cranch, 193; Browne *v.* Robinson, 2 Caines' Cas. 341; Carman *v* Garrison, 13 Penn. State, 158

(*j*) Slayback *v.* Jones, 9 Ind. 470; Mahurin *v.* Pearson, 8 N. H. 539; Harrison *v.* Henderson, 4 Ga. 198; Newell *v.* Salmons, 22 Barb. 647; Kent *v.* Rogers, 24 Misso 306.

ing him to settle with the principal.(*k*) In debt against principal and surety of a bond, a debt due from the plaintiff to the principal may be set off.(*l*) So either maker of a joint and several note may be held liable, or the note set off against either.(*m*) But ordinarily, a separate counter claim of one of several joint debtors cannot be set off in a suit against them all, nor can a joint debt against a several debt.(*n*) In an action by several plaintiffs, a separate demand against one alone cannot be set off.(*o*) And so in a suit against B by A, the defendant cannot set off a joint note executed by A and C.(*p*) The true rule in all cases is, that the debts must be mutual.(*q*)

The defendant must be in actual possession of the claim, as its owner.(*r*) It is not enough that it is lent to him for the purpose of set-off, or transferred to him under an arrangement partly for his benefit, and partly for that of the holder. But it is no sufficient objection of itself, that the defendant purchased the claims for the purpose of set-off. A defendant, it has been held, cannot set off a judgment for his use in another's name.(*s*) Nor does a

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(*k*) Lynch *v.* Bragg, 13 Ala. 773.

(*l*) Concord *v.* Pillsbury, 33 N. H. 310.

(*m*) Pate *v.* Gray, 1 Hempst. C. C. 155; Powell *v.* Hogue, 8 B. Mon. 443.

(*n*) M'Dowell *v.* Tyson, 14 S. & R. 300; Henderson *v.* Lewis, 9 id. 379; Peabody *v.* Beach, 6 Duer, 53; Mott *v.* Burnett, 2 E. D. Smith, 50; Woodruff *v.* State, 2 Eng. Ark. 333; McCully *v.* Silverburgh, 18 Ill. 306; Burgwin *v.* Babcock, 11 id. 28; Vose *v.* Philbrook, 3 Story, 335; Bullard *v* Dorsey, 7 Smedes & M. 9; Peoria & Oquawka R. R. Co. *v.* Neill, 16 Ill. 269; Walker *v.* Chovin, id. 489.

(*o*) Johnson *v.* Kent, 9 Ind. 252.

(*p*) Blankenship *v.* Rogers, 10 Ind 333; Robertson *v.* Parks, 3 Md. Ch 65. But a bond of the plaintiff and another may be set off when coupled with proof that it was to be so applied by agreement. Perkins *v.* Hawkins, 9 Gratt. 649; Baker *v.* Smith, 8 Texas, 346.

(*q*) Claims to set-off must be mutual as to the nature of the demand, and the parties to the record or in interest, except there be an agreement of the parties to the contrary. Ryan *v.* Barger, 16 Ill. 28. Where a plaintiff sues several defendants jointly and severally liable, either may present in set-off notes given by the plaintiff. Briggs *v.* Briggs, 20 Barb. 477 Equity in general will no more than law allow debts accruing in different rights to be set off against each other. But it may interpose in circumstances justifying it, when the law would not be authorized to do so. Black *v* Whitall, 1 Stockt. 572; Henderson *v.* Gillian, 12 Texas, 71. Set-off beyond the letter of the statutes is an equitable defence; hence, though a note owned jointly can be sued jointly only, yet one joint owner may, by consent of the other, set off his portion of the note, in an action brought against him. Smith *v.* Myler, 22 Penn. State, 36.

(*r*) Pettee *v.* Prout, 3 Gray, 502; Bullock *v.* Dunbar, 17 Texas, 243.

(*s*) Harrel *v* Petty, 11 Rich. Law, 373.

set-off extend to claims purchased conditionally, to be returned if not used.(*t*) It extends to existing causes of action only.(*u*) In some cases the rule has been strictly laid down, that notice of new notes purchased in set-off must have been given to the payee before he transferred to the plaintiff, to operate against the latter, for the maker must have perfected his claim against the payee.(*v*)

It has been held that the burden of proof is on the plaintiff to show that an assignment was made before the discount or set-off accrued as well in a bond (*w*) as a negotiable note; (*x*) and that the presumption is that the defendant had the counter claim before the action commenced.(*y*) If an assignee for value of a non-negotiable note have a suit brought for his benefit in the name of the payee, the maker may set off a debt due him at the time of assignment.(*z*) And whenever an action is brought for another's use, the defendant may plead any set-off against the beneficiary, and if the trust is not disclosed on the record, the defendant may prove it.(*a*) The counter claim must be against the plaintiff of record, under the New York code, and there is no right to set it up after the assignment of a chose in action.(*b*)

(*t*) Straus *v.* Eagle Ins. Co., 5 Ohio State, 59; Adams *v.* McGrew, 2 Ala. 675; McDade *v.* Mead, 18 id. 214; McDonald *v.* Harrison, 12 Misso. 447.

(*u*) Hill *v.* Butler, 6 Ohio State, 207.

(*v*) Parker *v.* Kendall, 3 Vt 540.

(*w*) Jervey *v.* Strauss, 11 Rich. 366.

(*x*) But it has been held that the burden is with the defendant to show that he owned the set-off before the commencement of the suit. Smith *v.* Ewer, 22 Penn. State, 116. The ground taken was, that the affirmation being undertaken by the defendant of alleging set-off, the *onus* is with him. And the mere negotiability of a note offered in set-off is not proof sufficient, since notes are often negotiated after maturity. We may add, as a further reason for letting the *onus* rest on the defendant, that he is best able to tell the circumstances and time of the transfer, which may be wholly unknown to the plaintiff.

(*y*) Griffin *v.* Evans, 23 Ga. 438. The defendant sued by the assignee of a note cannot set off a claim against the assignor, unless he shows that he held it at the time of the notice of the assignment. Ritchie *v.* Moore, 5 Munf. 388; Stewart *v.* Anderson, 6 Cranch, 203.

(*z*) Sanborn *v.* Little, 3 N. H. 539.

(*a*) Sheldon *v.* Kendall, 7 Cush. 217; Forkner *v.* Dinwiddie, 3 Ind. 34; Sykes *v.* Lewis, 17 Ala. 261.

(*b*) Spencer *v.* Babcock, 22 Barb. 326. C assigned A's note to B. Afterwards A recovered against B on a note, and assigned his judgment to D. In a suit in equity between B and D, it was held that B had the prior equities, and that the first note was a good set-off against the judgment, conceding that C assigned his note to B without payment, for the purpose of getting payment from A. Dorsey *v.* Reese, 14

In England, as in this country, no set-off is good which is *en autre droit.*(*c*) Thus a bill held by a trustee as such cannot be set off on his own account, the creditor being ignorant of his possession of the bill.(*d*) Since a note to A or bearer may be sued by any holder, it may be so sued though the plaintiff be A's general agent; but if it be shown that A is still its owner, there will be a right of set-off against him.(*e*) And a counter claim arising out of affairs in which others than the parties to the suit are interested cannot be made available as a defence.(*f*)

An *executor* or *administrator* may undoubtedly set off mutual accounts existing at the death of the decedent; (*g*) but it is held that a defendant cannot set off against a suit by an administrator a claim against the deceased, which the defendant bought after his death.(*h*) It has been held, that a debt due from the deceased in his life cannot be set off against one which has accrued to the administrator since his death.(*i*) But the general rule in relation to suits by or against the representatives of the deceased seems to make this distinction between the case of a solvent and of an insolvent estate. In the former it may be set off, although the debt be not mature and due at the death of the deceased. But if the estate of the deceased be insolvent, the death seems to fix the right of the parties, and a debt cannot be set off which was not due at the time of the decease, although it has become due before the action is brought.(*j*)

To a suit for money had and received to the use of the plaintiff

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B. Mon. 157. The defendant's note to B was indorsed over through C and D to E, the plaintiff. Held, that the defendant could not set off a debt due to him from C, once a holder of the note. Hooper *v.* Spicer, 2 Swan, 494.

(*c*) Gale *v.* Luttrell, 1 Younge & J. 180.

(*d*) Fair *v.* M'Iver, 16 East, 130.

(*e*) Pettee *v.* Prout, 3 Gray, 502. See Forkner *v.* Dinwiddie, 3 Ind. 34.

(*f*) Coursen *v.* Hamlin, 2 Duer, 513; Gleason *v.* Moen, id. 639.

(*g*) Boardman *v.* Smith, 4 Pick. 212; Light *v.* Leininger, 8 Barr, 403.

(*h*) Root *v.* Taylor, 20 Johns. 137.

(*i*) Lambarde *v.* Older, 17 Beav. 542, 23 Eng. L. & Eq. 45; Bizzell *v.* Stone, 7 Eng. Ark. 378; Wolfersberger *v.* Bucher, 10 S. & R. 10; Colby *v.* Colby, 2 N. H. 119; Fry *v.* Evans, 8 Wend. 530; Mills *v.* Lumpkin, 1 Kelly, Ga. 511.

(*j*) Bosler *v.* Exchange Bank, 4 Barr, 32; Rawson *v.* Copland, 3 Barb. Ch. 166. But sometimes the general rule is laid down, that any debt to be used as set-off must have accrued during the intestate's lifetime. Armstrong *v.* Pratt, 2 Wis. 299. See Richardson *v.* Parker, 2 Swan, 529; Kerr *v.* Webb, 9 Rich. Eq. 369; Irons *v.* Irons, 5 R. I. 264; Pearson *v.* Darrington, 32 Ala. 227, on set-offs to administrators' suits.

as administrator, the defendant cannot plead a set-off of money lent by him to the intestate.(*k*) A debtor to an estate, though it be insolvent, may set off against the administrator's suit any claim due to him from the estate, if created in the intestate's lifetime.(*l*) If notes be taken running "to the estate" of the deceased, they may be set off against a legacy given to the promisor.(*m*)

In an action against a defendant in his own right, he cannot set off a debt due to him as administrator or guardian, unless he has been charged with the debt on a final settlement in the court of probate before issue of the writ.(*n*) In an action for the price of goods sold at the vendue, the defendant cannot set off a debt due to him by the decedent.(*o*) And a party who receives property as part of the assets of an estate cannot, when sued for it, set off a debt due from the estate to him.(*p*)

When an executor is sued for a debt accruing from the testator during his lifetime, he may set off a debt due from the plaintiff to him as executor, which accrued since the testator's death.(*q*) A debtor may set off notes given by the intestate, though assigned after his death, if they would be good against an action brought by the intestate, were he living.(*r*) Where a former administrator sues the administrator *de bonis non* for expenses incurred for the estate, the latter has been allowed to set off specified property converted by the former to his use.(*s*)

Insolvency. — Set-off under statutes of bankruptcy and insolvency have been made the subject of much legislation, both in England and in this country. In England it has been enacted,(*t*) that, where there are mutual debts between the

(*k*) Watts *v.* Rees, 9 Exch. 696, 25 Eng. L. & Eq. 565. Where an executor, on a note given to him as executor, for a debt due to his testator, brings a suit in his own name, a debt due from the testator cannot be set off. Merritt *v.* Seaman, 2 Seld. 168.

(*l*) Richardson *v.* Parker, 2 Swan, 529.

(*m*) Wilson *v.* Edmonds, 4 Foster, 517.

(*n*) White *v.* Word, 22 Ala. 442. A judgment against an administrator, on a debt of his intestate, is a good set-off, in a suit by him on a note payable to himself for the hire of a slave belonging to the estate. Crabtree *v.* Cliatt, 22 Ala. 181.

(*o*) Steel *v.* Steel, 12 Penn. State, 64.

(*p*) McDonald *v.* Black, 20 Ohio, 185.

(*q*) Mardall *v.* Thellusson, 18 Q. B. 857, 14 Eng. L. & Eq. 74.

(*r*) McGinnis *v.* Allen, 2 Swan, 645.

(*s*) Thomas *v.* Hill, 3 Texas, 270

(*t*) 12 & 13 Vict. ch. 106, § 471, re-enacting 6 Geo. IV. ch. 16, § 50

bankrupt and any other person, one debt may be set against another, provided that the person claiming the benefit of such set-off had not, when such credit was given, any notice of any specific act of bankruptcy by such bankrupt committed. It makes no difference that the bankrupt had committed a prior act of bankruptcy before the credit given him; but after notice of the fact, a bill or note cannot be set off under a commission of bankruptcy.(*u*)

Formerly the right of set-off must have existed at the time of the bankruptcy, and hence, if the holder of a bill negotiated it before the acceptor's bankruptcy, and took it up after, he could not set it off against his debts to the bankrupt.(*v*) But this doctrine has since been overthrown,(*w*) and the set-off is good, though immature at the bankruptcy or in the hands of an indorsee. It has been held that where there is a clear right of set-off in case of cross acceptances in bankruptcy, a court of equity will restrict the assignee from bringing an action.(*x*) But a man cannot knowingly buy up and set off accommodation notes made by a bankrupt.(*y*)

Statutes similar to the English statutes of set-off in insolvency are to be found in this country.(*z*) A bank cannot set off notes left with them for discount, which they have refused to discount, in an action brought by the assignees in insolvency of the depositor, on a debt due from the bank to him before his insolvency.(*a*) The maker cannot set off a demand against a bank in an action by its receivers, not due when the note became due or

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(*u*) "Unless, perhaps, where the credit upon the bill or note forms part of a credit previously created; as, where goods are sold upon a credit, with liberty, before the credit expires, to draw a bill or demand a note for the price." Bayley on Bills, ch. 10, p. 483. But see Byles on Bills, p. 293, and the cases there cited.

(*v*) Ex parte Hale, 3 Ves 304.

(*w*) Collins *v.* Jones, 10 B. & C. 777; Russell *v.* Bell, 8 M. & W. 277; Atkinson *v.* Elliott, 7 T. R. 378; Ex parte Wagstaff, 13 Ves. 65. When a party takes a bill immediately from the acceptor, advancing money thereon, and indorses it over, such bill may, upon the subsequent bankruptcy of the acceptor, be set off against a claim of the acceptor's, because the indorser's subsequent payment restores the claim which he originally had. Bolland *v.* Nash, 8 B. & C. 105. The assignees of a bankrupt cannot annul a set-off once existing. Id.; Edmeads *v.* Newman, 1 B. & C. 418.

(*x*) Ex parte Clegg, 1 Mont. & A. 91.

(*y*) Ex parte Stone, 1 Glyn & J. 191.

(*z*) Gen. Stats. of Mass. 1860, ch. 118, § 26.

(*a*) Stetson *v.* Exchange Bank, 7 Gray, 425.

when the receiver was appointed.(*b*) And not even the bills of the bank could be set off, purchased by them after an injunction has issued against it, preliminary to its winding up, — especially if purchased by a director at discount, as this would violate the statute rule of equality in payment between the bill-holders of an insolvent bank.(*c*)

If the defendant purchased the claim in set-off with knowledge that the creditor had filed his petition in bankruptcy, it is no valid set-off.(*d*) A negotiable note, taken for value without notice that an action has been commenced on a debt due from the purchaser to the maker, and before the first publication of notice of the issuing of a warrant in insolvency against the maker, may be set off in such action, when prosecuted by the maker's assignee in insolvency, even though not yet payable.(*e*)

When an insolvent had money in a bank where a bill of exchange which he had indorsed was discounted for him, which bill matured a few days after his assignment, but before the bank had notice of it, and was protested for non-payment: in an action by the assignee for the money on deposit, the bank could not set off the amount of the bill, either at common law or under the New York statute.(*f*)

It has been held that, if a note be assigned after maturity, the payee being then solvent, with notice to the maker, the latter cannot set off his payments upon judgments recovered against him, after the notice upon his liabilities in behalf of the payee entered into before the assignment.(*g*) A set-off of the maker, good in other respects, is not defeated by a subsequent discharge

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(*b*) U. S. Trust Co. *v.* Harris, 2 Bosw. 75.

(*c*) Clarke *v.* Hawkins, 5 R. I. 219. So, under the Connecticut statute, bills of the same bank were no set-off to the receiver's suit against an indorser of a note belonging to a bank, although he held a portion of these bills at the time of the bank's failure, and when the note became due. Eastern Bank *v.* Capron, 22 Conn. 639.

(*d*) Smith *v.* Brinckerhoff, 8 Barb. 519, 2 Seld. 305. The purchaser in such case takes the place of the seller. And the law is the same where only one of a firm petitions. Id.

(*e*) Aldrich *v.* Cambell, 4 Gray, 284.

(*f*) Beckwith *v.* Union Bank, 5 Seld. 211. Where an insolvent was indebted to a creditor in a certain amount due at the time of insolvency, and a creditor owed a note due in a few days, this was held a mutual credit and a set-off was allowable. Jones *v* Robinson, 26 Barb. 310.

(*g*) Follett *v.* Buyer, 4 Ohio State, 586.

of the payee as a bankrupt.(*h*) When an insolvent, having assigned for his creditors' benefit, sues a claim for the assignees, and the defendant, being surety for the plaintiff on a note, pays it and files this as set-off, it will not be allowed.(*i*)

Husband and Wife. — If a husband alone sue a note given to his wife, he is not liable, it is said, to a set-off of a debt from her *dum sola*, but is liable to a debt due from himself; (*j*) as, however, he is generally liable for her debts, it is not easy to find a substantial reason for this distinction. He may join her if he will, and then he is liable to set-off for a debt due from her; but, it is said, not to a debt due from himself; (*k*) but we should doubt the reason of the distinction here also. It is held in Pennsylvania and New Hampshire, that where husband and wife sue an executor for a legacy to the wife for her use alone, the defendant cannot set off a debt due from the husband to the testator; (*l*) and the justice of this decision is unquestionable. A note given by A to B's wife before her marriage, and remaining her separate property, is no set-off to A's suit against B on other notes.(*m*) And the husband's debt after divorce cannot be set off, though the wife's claim accrued during coverture.(*n*)

What Claims may be set off. — Of many of these we spoke in the early part of the present section. A party cannot set off the same claim against two separate actions pending at the same time.(*o*) But where actions are brought on two valid notes, although the defendant be entitled to set-off to an amount greater than one, still the notes are suable separately, and the plaintiff

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(*h*) Harwell *v.* Steel, 17 Ala. 372.

(*i*) Nettles *v.* Huggins, 8 Rich. 273. The assignees of A, an insolvent, brought an action against B on a note given to A. A set-off of a sum paid by B after the assignment on a note of A, and protested before the assignment, on which B was indorser, was held good. Morrow *v.* Bright, 20 Misso. 298.

(*j*) Burrough *v.* Moss, 10 B. & C. 558.

(*k*) Burrough *v.* Moss, 10 B. & C. 558. A joint interest in husband and wife cannot be set off by a debt due from the husband alone. Glazebrook *v.* Ragland, 8 Gratt. 332.

(*l*) Jamison *v.* Brady, 6 S. & R. 466; Pierce *v.* Dustin, 4 Foster, 417.

(*m*) McCarty *v.* Mewhinney, 8 Ind. 513.

(*n*) Fink *v.* Hake, 6 Watts, 131. See further, on set-off in the case of husband and wife, Ferguson *v.* Lothrop, 15 Wend. 625; Wishart *v.* Downey, 15 S. & R. 77; Smith *v.* Johnson, 5 Harring. Del. 40; Succession of Gilmore *v.* Bayly, 12 La. Ann. 562; Stokes *v.* Forman, id. 671.

(*o*) Chase *v.* Strain, 15 N. H. 535.

is not required to consolidate them.(*p*) And under some codes, the defendant is not bound to set up the set-off at all, but may elect to enforce its recovery in a separate action.(*q*) In general, if a suit is brought on several distinct claims, a set-off, on being allowed, should be ratably applied to each claim. Hence a surety to one cannot insist on having the whole of his discharged, at the expense of the others.(*r*)

In actions *ex delicto*, as trespass or trover, there is no set-off.(*s*) Yet in an action of trover it was held, that mutual demands arising out of the same subject-matter, and capable of being balanced against each other, may be adjusted in one action by the law of recoupment; but the defendant is not allowed to recover any balance.(*t*) Since damages sounding in tort, as those laid for trespass or trover, are unliquidated, they are not the subject of set-off, either at law or in equity.(*u*) It has been held that, after tender of the amount secured by mortgage and refusal by the mortgagee, he cannot set it off in an action of trover.(*v*)

The set-off must, as we have already said, be a subsisting legal debt. A mere unexecuted agreement for a set-off is null as a defence.(*w*) And it has been held that a defendant cannot set off a draft on him by the plaintiff without proving payment.(*x*) The general rule is, that a demand on an accepted order is no set-off unless the money is due at the commencement of the action.(*y*) In a suit on notes given in settlement of accounts, a claim set up in set-off must be shown to be not included in the settlement.(*z*) Where a note is proposed as a set-off, we think the plaintiff may always reply and prove that the said note was given by him without consideration, or under duress,

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(*p*) Buckner *v.* Thompson, 11 Ill 563.

(*q*) Halsey *v.* Carter, 1 Duer, 667.

(*r*) Franklin Bank *v.* Cooper, 36 Maine, 221.

(*s*) Keaggy *v.* Hite, 12 Ill. 99

(*t*) Stow *v.* Yarwood, 14 Ill. 424.

(*u*) Vaught *v.* Wellborn, 16 Ala. 377; Pulliam *v.* Owen, 25 id. 492; Hopkins *v.* Megquire, 35 Maine, 78; Schweizer *v.* Weiber, 6 Rich. 159; Conklin *v.* Parsons, 1 Chandl. Wis. 240.

(*v*) Fuller *v.* Parrish, 3 Mich. 211.

(*w*) Fugit *v.* Ewing, 9 Ind. 345.

(*x*) Wakeman *v.* Vanderbilt, 3 Calif. 380.

(*y*) Toppan *v.* Jenness, 1 Foster, 232.

(*z*) Perry *v.* Roberts, 17 Misso. 36; Campbell *v.* Hays, 1 Ind. 547.

or by fraud, and thus defeat the set-off.(*a*) But in strictness there can be no set-off against a set-off,(*b*) though a set-off may be defeated in part, or diminished, as much as it might be if it were a principal claim.

No set-off can be offered by a defendant against a lien. As if one employed a workman about a chattel in a way to give him a lien on it, and when the workman demanded his wages the employer should file in off-set a note due from the workman to him, it would seem that this off-set would not be admitted. And it has even been rejected where the defendant had made an express promise to the plaintiff to pay him in cash for his work. Where the contractor is joined as a defendant in an action under the lien law, he may avail himself of a set-off to the plaintiff's claim.(*c*)

It is a general and useful rule, that any debt may be set off for which *indebitatus assumpsit* will lie.(*d*) A debt barred by the statute of limitations is no valid set-off.(*e*) But if the defendant plead a set-off, and the plaintiff reply the statute of limitations, this, in strict pleading, admits the set-off, and the issue is on the replication.(*f*) On the other hand, a note which had not at the time of trial arrived at maturity cannot be set off.(*g*)

Negotiable paper may always be transferred, if not overdue, for the purpose of avoiding a set-off which the maker would have against the action upon it, and a transferee for value takes a perfect title, free from the set-off, though he were aware of it.(*h*)

If a set-off belonged to all the defendants jointly at the commencement of the suit, it is no objection that one defendant derived his title by assignment from a co-defendant.(*i*) If the obligor has notice of the assignment, and afterwards procures a

(*a*) Bunnell *v.* Butter, 23 Conn. 65; Carriere *v.* Ticknor, 26 Ala. 571.

(*b*) Gable *v.* Parry, 13 Penn. State, 181.

(*c*) Grogan *v.* McMahon, 4 E. D. Smith, 754.

(*d*) Austin *v.* Feland, 8 Misso. 309.

(*e*) Williams *v.* Gilchrist, 3 Bibb, 49; Crist *v.* Garner, 2 Pen. & W. 251; Turnbull *v.* Strohecker, 4 McCord, 210.

(*f*) Gale *v.* Capern, 1 A. & E. 102.

(*g*) Evans *v.* Prosser, 3 T. R. 186.

(*h*) Tillou *v.* Britton, 4 Halst 120.

(*i*) Bell *v.* Davis, 8 Barb. 210.

demand against the payee, it is no set-off to the assignee, even though there was no notice of the name of the assignee.(*j*) And the equity against an obligee, to be made available against his assignee, must, as we have said, have existed before notice of the assignment.(*k*) A debtor of a bank, the funds of which are in commissioners' hands for liquidation, may set off a claim due to him at the assignment.(*l*)

Pleadings. — As to the time when a set-off must have matured, the rule in general is, as we have before intimated, that the claim must have accrued and become due before the bringing of the suit.(*m*) If it fall due during the progress of the suit, advantage may be taken of the claim by plea of *puis darrein continuance.*(*n*) And a draft acquired after commencement of a suit may be pleaded under some codes in set-off by amendment.(*o*) If the defendant acquired the note on the same day of date with that of the plaintiff's writ, but after it was placed in the officer's hands, though before service, it has been held no valid set-off.(*p*) The rule has also been laid down, that any claim acquired before pleading may be pleaded in set-off; but if acquired after the suit was brought, the plaintiff recovers costs of the action.(*q*)

The pleadings and rules of set-off differ greatly according to the statute provisions of the various States. The substance of the adverse claim is known also variously as set-off, cross-claim, counter-claim, recoupment, and, in Louisiana and Texas, compensation and reconvention.(*r*) The Indiana statute distinctly

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(*j*) Small *v.* Browder, 11 B. Mon. 212.

(*k*) Wray *v.* Furniss, 27 Ala. 471.

(*l*) Finnell *v.* Nesbit, 16 B. Mon. 351. A legal claim cannot be set off in equity against the assignee of another legal claim. Hutchins *v.* Hope, 7 Gill, 119. A sealed note may be set off by the holder against a bill single, though he be not the payee, and it be transferred by mere delivery. Hickerson *v.* McFaddin, 1 Swan, 258.

(*m*) McDade *v.* Mead, 18 Ala. 214; Varney *v.* Brewster, 14 N. H. 49; Van Valen *v.* Lapham, 5 Duer, 689; Houghton *v.* Houghton, 37 Maine, 72; Houston *v.* Fellows, 27 Vt. 634; Buffum *v.* Deane, 4 Gray, 385.

(*n*) Keith *v.* Smith, 1 Swan, 92.

(*o*) Gaines *v.* Salmon, 16 Texas, 311; Griffin *v.* Chubb, id. 219.

(*p*) Hardy *v.* Corlis, 1 Foster, 356.

(*q*) Thomas *v.* Young, 5 Texas, 253. In a suit by the vendee of goods, a note of the vendee must be payable at or before the suit, in order to be a good set-off in the hands of the vendor. Rogerson *v.* Ladbroke, 1 Bing. 93; Belcher *v.* Lloyd, 10 id. 310.

(*r*) Knox *v.* Thompson, 12 La. Ann. 114; Morgan *v.* Lathrop, id. 257; Vincent *v.* Gandolfo, id. 526; Griffin *v.* Chubb, 16 Texas, 219.

and separately defines set-off and counter-claim, and the two definitions have been held to differ materially.(*s*) In general, wherever a statute set-off is provided, the rule is enforced, that the claim must be put in according to the statute terms.(*t*)

Since a set-off is not strictly a defence to the action, and does not deny the plaintiff's statement, but operates like a cross-claim, it may be withdrawn after it is filed.(*u*) But its withdrawal should be explicit, as in the case of nonsuit, to which it is somewhat analogous.(*v*) And after withdrawal, its particulars may be good evidence to explain the substituted plea.(*w*)

For like reasons, drawn from the nature of set-off, it is commonly considered that it should be pleaded specially or separately.(*x*) So it is said that the plea of set-off must state the items of demand,(*y*) and that its nature, at all events, must be set forth in the defendant's answer.(*z*) But in England, the sum mentioned has been considered immaterial, the question being whether the sum proved by the defendant equals the plaintiff's dues.(*a*) A notice of set-off is to be considered, in some cases, as a plea.(*b*) And if a set-off be unanswered when filed in a suit, and it exceed the demand, defendant will have judgment.(*c*)

In general it has been held, when the question has been adjudicated, that no plea of set-off is good against a State, unless some express provision of the statute can be shown to sustain it.(*d*) And State statutes cannot regulate set-off in suits by the United States against its officers. Nor is there any Act of

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(*s*) Lovejoy *v.* Robinson, 8 Ind. 399.

(*t*) Biscoe *v.* State, 19 Ark. 559.

(*u*) Theobald *v.* Colby, 35 Maine, 179.

(*v*) Muirhead *v.* Kirkpatrick, 5 Watts & S. 506.

(*w*) Buckmaster *v.* Meiklejohn, 8 Exch. 634, 20 Eng. L. & Eq. 324.

(*x*) Graham *v.* Partridge, 1 M. & W. 395; Eastman *v.* Laws, 5 Bing. N. C. 444; Sargent *v.* Southgate, 5 Pick. 312; Bowen *v.* Hale, 4 Iowa, 430; Stockton *v.* Graves, 10 Ind 294; Porche *v.* Le Blanc, 12 La. Ann. 778. In Pennsylvania, however, under the defalcation act, payment is the only plea necessary to let in set-off. Balsbaugh *v.* Frazer, 19 Penn. State, 95.

(*y*) Chambers *v.* Games, 2 Greene, Iowa, 320.

(*z*) Bernard *v.* Mullott, 1 Calif. 368.

(*a*) Nichols *v.* Tuck, 16 Eng. L. & Eq. 104.

(*b*) Miller *v.* Miller, 16 Ill. 296.

(*c*) Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Misso. 91.

(*d*) White *v.* Governor, 18 Ala. 767; Chevallier *v.* State, 10 Texas, 315.

Congress to regulate it, though several, it is said, imply that it may be allowed.(*e*) But we will not enter further into details of the pleading and practice in set-off.(*f*) It should, however, be said, as a final remark on this subject, that nearly all these rules given above are qualified in cases in which obvious and certain equity requires their modification; for, as we have already intimated, and as indeed some of our notes will show, the law of set-off is administered, even in courts of law, very much on equitable principles.

SECTION VIII.

OF TENDER.

If a tender be pleaded or offered in evidence, it must be shown to have been made after the note was due; (*g*) if made on the second day of grace, for instance, it would be unavailing. It must be made in money, which is by law a legal tender; but if a tender be made in current and genuine bank-bills, this will be sufficient, unless they are objected to and refused as such, and because not money.(*h*) In England, Bank of England notes are a good legal tender, above a certain amount.(*i*) In no part of this country are bank-notes legal tender if objected to.(*j*) A

(*e*) U. S. *v.* Prentice, 6 McLean, 65.

(*f*) See Arnold *v.* Bainbrigge, 9 Exch. 153, 24 Eng. L. & Eq. 451; Gragg *v.* Frye, 32 Maine, 283; Bell *v.* Davis, 8 Barb. 210; Conklin *v.* Waltz, 3 Ind. 396; Bell *v.* Crawford, 8 Gratt. 110; Watkins *v.* Hopkins, 13 id. 743; Robinson *v.* Mace, 16 Ark. 97; Fowler *v.* Lawson, 15 id. 148; Reed *v.* Akin, 14 id. 475; Goodwin *v.* McGehee, 15 Ala. 232; Dawson *v.* Dillon, 26 Misso. 395; Merchants Bank *v.* Rawls, 21 Ga. 289. There is no set-off, where the plaintiff has no cause of action. Claridge *v.* Klett, 15 Penn. State, 255.

(*g*) So, where tender of payment is made to a holder before the note is due, but, refusing it, he indorses the note to one who knew of the tender, the latter's suit will lie, because the tender is inoperative. Tillou *v.* Britton, 4 Halst. 120.

(*h*) Brown *v.* Saul, 4 Esp. 267; Polglass *v.* Oliver, 2 Cromp. & J. 15; Grigby *v.* Oakes, 2 Bos. & P. 526; Cummings *r.* Putnam, 19 N. H 569; Curtiss *v.* Greenbanks, 24 Vt. 536. By statute 3 & 4 Wm. IV. c. 98, Bank of England notes were made legal tender for any amount above £5, except at the Bank of England or its branches.

(*i*) See *supra*, note *h*.

(*j*) Paup *v.* Drew, 10 How. 218; Trigg *v.* Drew. id. 224.

bank-check will, in some States, be a good tender where the amount only is objected to.(*l*) So, for a tender of stock sold, a tender of the certificates with a power for the transfer is sufficient, without actual transfer, if the objection is made, not on this, but on other grounds.(*m*)

The tender of a sum less than the amount of the bill or note, and less than the creditor's dues, is not good, even *pro tanto*, as it should seem.(*n*) A tender made only after suit brought must be of the sum with interest and costs, and this must be averred in the plea.(*o*) It has been held that tender of the sum with costs of the writ is sufficient, even though the writ has been sent away for service, if there be time to recall it, before it is served; (*p*) and again, that tender of the debt without costs to the creditor for employing attorney, &c., is sufficient, if the writ, though handed to a sheriff, has not been served, especially if it was not known that costs were incurred.(*q*) When a good legal tender is once made, it stops interest and costs.(*r*)

A tender of the gross sum on several demands, without particularizing the sum due on each, is sufficient.(*s*) But a tender of money in general without stating its amount, or that it is sufficient to cover the debt, appears to be invalid.(*t*)

(*l*) Jennings *v.* Mendenhall, 7 Ohio State, 257.

(*m*) Munn *v.* Barnum, 24 Barb. 283. Warrants on the treasury of the Territory of Florida were held no good tender for a debt due to that State, in Bemis *v* State, 3 Fla. 12. Silver quarter-dollars of the United States coinage prior to act of 1853 are legal tender to any amount. But it was queried if this were true with regard to those coined under the act of 1853. People *v.* Dubois, 18 Ill. 333. A person presented at one time thirty five-dollar bills of the Mechanics' Bank, and the bank tendered three hundred half-dollars, issued under the act of 1853. This was held a legal tender, three judges dissenting. Strong *v.* Farmers & Mechanics' Bank, 4 Mich. 350.

(*n*) Cotton *v.* Godwin, 7 M. & W. 147; Hesketh *v.* Fawcett, 11 id. 356; Henly *v.* Streeter, 5 Ind. 207.

(*o*) Smith *v.* Anders, 21 Ala 782.

(*p*) Call *v.* Lothrop, 39 Maine, 434.

(*q*) Hull *v.* Peters, 7 Barb. 331, *Marvin*, J. dissenting.

(*r*) Dent *v.* Dunn, 3 Camp. 296; Woodruff *v.* Trapnall, 7 Eng. Ark. 640; Huntington *v.* Ziegler, 2 Ohio State, 10. But in Maine, in an action against principal and surety, on a poor debtor's bond, with tender of the amount, the plaintiff may have, by statute, a special judgment against the principal debtor for twenty per cent interest on the amount due after the breach of the bond. Call *v.* Lothrop, 39 Maine, 434.

(*s*) Thetford *v.* Hubbard, 22 Vt. 440.

(*t*) The defendant said to the plaintiff, as the latter was passing in his wagon, "I want to tender you this money for labor you have done for me," — holding in his hand

A tender must be made by the debtor himself or by his agent, and not by a stranger.(*u*) In like manner it must be accepted or refused by the creditor or his authorized agent.(*v*) But a tender made to the lawful attorney of a party is sufficient,(*w*) and if he be the attorney in fact, though he deny his authority, it is good.(*x*) A tender to one of two partners on a note owned by the partnership is a tender to both.(*y*)

Many of the objections to the validity of tenders may be waived by the act of the creditor or the creditor's agent. Thus, the tender of a bond agreed to be given is good, if the other party, in refusing to accept it, admits its sufficiency, without an exhibition of its writing or proof of its execution.(*z*) If a tender is made, and the creditor object to the time of the tender only, the amount is *prima facie* correct.(*a*) And a bank-check may be a good tender, as we have seen, where the amount only is objected to, and objection to the nature of the tender is waived. But mere silence, it seems, is not such waiver.(*b*) If tender is refused, it cannot afterwards be objected that the money was not counted out, nor in fact offered.(*c*) It has even been held that want of authority in an agent to make a tender cannot be alleged in answer, unless objected to when the tender was made.(*d*) And so it has been queried whether, if a party have knowledge of a subsisting lien on goods sold, and fail to make the objection resulting from that fact, he may not thereby have waived the objection.(*e*)

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a sum equal to the debt, but naming no sum. The plaintiff made no reply, and did not stop his team, but drove on. Held that this did not constitute a valid tender. Knight *v.* Abbott, 30 Vt. 577.

(*u*) McDougald *v.* Dougherty, 11 Ga. 570.

(*v*) A statement of the secretary of an insurance company, that he had no stock for a subscriber, was not considered as dispensing with a tender of the price. Ohio Ins. Co. *v.* Nunemacher, 10 Ind. 234.

(*w*) Billiot *v.* Robinson, 13 La. Ann. 529.

(*x*) McIniffe *v.* Wheelock, 1 Gray, 600.

(*y*) Prescott *v.* Everts, 4 Wis. 314.

(*z*) Abrams *v.* Suttles, Busbee, Law, 99.

(*a*) Bradshaw *v.* Davis, 12 Texas, 336.

(*b*) Jennings *v.* Mendenhall, 7 Ohio State, 257.

(*c*) Wesling *v.* Noonan, 31 Missis. 599.

(*d*) Lampley *v.* Weed, 27 Ala. 621.

(*e*) Dunham *v* Pettee, 4 E. D. Smith, 500. *Infra*, note *m*, and the corresponding paragraph of the text.

The tender itself may be wholly waived or dispensed with by words or acts, and may be excused by circumstances or by omissions of the party to whom it should otherwise have been made.(*f*) A tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act. Actual production of the funds is, therefore, in such case dispensed with.(*g*) Hence, to support an averment of tender, proof of waiver of tender has been thought admissible and good.(*h*) Upon a valid tender of a third party's note in performance of a contract, the title is changed, and the contract discharged. And if the tender is refused, the party making it may continue the possession, and become bailee for the creditor.(*i*)

A tender not made in good faith is not a valid tender.(*j*) But, on the other hand, where a tender is required to be made before action brought, a fraudulent absence to avoid the tender estops the party from objecting that none has been made.(*k*) The party receiving a tender must have had an opportunity to object to it.(*l*) So long as there is a subsisting lien on goods sold, tender is dispensed with. Nor is it enough that it appears that, if the owners had called for the goods, the party holding the lien would have waived it, and delivered the goods.(*m*)

A tender must be pleaded with a profert, or with whatever is made its equivalent by the practice or rules of the court. The money itself should, in the usual practice, be brought into court,(*n*) that it may be tendered there again, as it appears to be by the defendant's plea. And this necessity results from the fact that a tender of payment, followed by a refusal to accept, is

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(*f*) Ex parte Danks, 2 De G., M. & G. 936, 19 Eng. L. & Eq. 486; Holmes *v.* Holmes, 12 Barb. 137.

(*g*) Stone *v.* Sprague, 20 Barb. 509; Hazard *v.* Loring, 10 Cush. 267; Hunter *v.* Warner, 1 Wis. 141; Holmes *v.* Holmes, 5 Seld. 525; *supra*, note *f*.

(*h*) Holmes *v.* Holmes, 5 Seld. 525.

(*i*) Des Arts *v.* Leggett, 16 N. Y. 582.

(*j*) Fisk *v.* Holden, 17 Texas, 408.

(*k*) Southworth *v.* Smith, 7 Cush. 391.

(*l*) Sloan *v.* Petrie, 16 Ill. 262.

m) Dunham *v.* Pettee, 4 E. D. Smith, 500.

n) Cullen *v.* Green, 5 Harring. Del. 17; Knox *v.* Light, 12 Ill. 86; Clark *v.* Mullenix, 11 Ind. 532; Mason *v.* Croom, 24 Ga. 211; Brock *v.* Jones, 16 Texas, 461; Henry *v.* Raiman, 25 Penn. State, 354. It may be paid in at any time. Cullen *v.* Green, *supra*.

no absolute discharge of a note or bill or other promise to pay money, and is no subject of a plea in bar.(*o*)

Unless a tender is made into court, it is no defence that a good previous tender was made.(*p*) A plea of tender, to be good, must state that the defendant ever has been ready, and still is ready, to pay the just demand, and the want of averment of present readiness, with non-production of the money into court, is defective.(*q*) But sometimes, in spite of a defect in this particular in the plea of tender, evidence that a proper offer was actually made has been permitted.(*r*) Since the continuing ability and desire of the debtor to pay enters into the plea of tender, it becomes a good replication that payment has been refused subsequently to the alleged tender.(*s*)

A tender at the time, and afterwards in court, throws the costs on the plaintiff. But if he goes on and proves that a larger sum was due, of course the tender is defective, and the plaintiff recovers costs. But if, in replying a larger sum, he fails in the proof, he pays costs, though he may get the sum already tendered.(*t*) But since a bill after the day of payment begins to carry interest and costs, a plea of tender of the face of the bill by the acceptor after that date is insufficient.(*u*) Though whether a drawer or indorser would be subject to the same strict rule, and whether his right to additional time for payment should not modify his obligation, has been considered questionable.(*v*)

Tender of part only of the amount declared on does not prevent the defendant from showing that no more was due.(*w*) The plea of tender may be good, although the declaration contain two counts, one of which is for a larger amount than the

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(*o*) Haynes *v.* Thom, 8 Foster, 386; Huntington *v.* Ziegler, 2 Ohio State, 10.

(*p*) Livingston *v.* Harrison, 2 E. D. Smith, 197.

(*q*) Clough *v.* Clough, 6 Foster, 24; Kortright *v.* Cady, 23 Barb. 490. An offer to confess judgment must, under the Indiana statute, be made in open court. Horner *v* Pilkington, 11 Ind. 440; Harter *v.* Comstock, id. 525.

(*r*) Clough *v.* Clough, 6 Foster, 24.

(*s*) Kortright *v.* Cady, 23 Barb. 490.

(*t*) Logue *v.* Gillick, 1 E. D. Smith, 398.

(*u*) Hume *v.* Peploe, 8 East, 168.

(*v*) Walker *v.* Barnes, 5 Taunt. 240; Soward *v.* Palmer, 8 id. 277; Siggers *v* Lewis, 1 Cromp. M. & R. 370, *contra*.

(*w*) Howlett *v.* Holland, 6 Gray, 418.

sum tendered.(*x*) If the money be brought into court, and the debtor pleads that only a part is due, the court may order payment of that part without impairing the plaintiff's claim to the residue.(*y*) But a plea of tender is not allowed with pleas denying or justifying the whole cause of action in respect of which the payment is pleaded, even with consent to withdraw the pleas, and suffer judgment on the plaintiff's receiving the money.(*z*)

If a tender be of specific articles, they must not be disposed of by the tenderer. But it is otherwise with money, when tender of it is refused. A sufficient amount only need be kept in readiness, and not the very coins tendered.(*a*) Upon refusal of a third party's note, the party tendering it may retain possession as bailee of the creditor.(*b*) A tender is not complete under the Louisiana civil code, until followed by an assignment or deposit of the money or notes.(*c*)

The tender must, it is sometimes said, be wholly unconditional.(*d*) But the true rule must be, or at least should be, that no condition possibly harmful to the creditor must be annexed, as that he should give a receipt in full of all demands. But the debtor may ask a receipt for what is taken. And if he pays a negotiable note, we should say he had a right to demand the note; (*e*) and we think he has an equal right to demand a note non-negotiable, unless there be a good reason for the non-delivery; although, in that case, a receipt would bar all suit. If the objection to the tender be put upon other grounds, the objection arising from demand of a receipt as condition precedent is thereby waived.(*f*) It has been held, that where an agent tendered payment and demanded the notes, which could not be surrendered up, because they had been mislaid, and the agent retained the money and failed, the holder recovered of the payer, because such tender did not extinguish the debt, nor

(*x*) Sawyer *v.* Baker, 20 N. H. 525.
(*y*) Merritt *v.* Thompson, 3 E. D. Smith, 599.
(*z*) Gales *v.* Holland, 7 Ellis & B. 336.
(*a*) Curtiss *v.* Greenbanks, 24 Vt. 536.
(*b*) Des Arts *v.* Leggett, 16 N. Y. 582.
(*c*) Walker *v.* Brown, 12 La. Ann. 266.
(*d*) Hunter *v.* Warner, 1 Wis. 141; Byles on Bills, 327.
(*e*) See chapter on Lost Notes.
(*f*) Cole *v.* Blake, Peake, 179; Richardson *v.* Jackson, 8 M. & W. 298.

put the money at the risk of the creditor; but it stopped the interest.(*g*)

If the contract is executory, an unconditional tender is not required. An offer to pay, accompanied with a demand of performance, is not bad, if, as in other cases, the money is in court on trial, and the tender otherwise unobjectionable.(*h*)

SECTION IX.

OF THE STATUTE OF LIMITATIONS.

THE statute of limitations is sometimes interposed as a defence. The provisions of these statutes in the several States, in respect to promissory notes and bills of exchange, differ considerably, as will be seen in our notes.(*i*) These statutes were

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(*g*) Dent *v.* Dunn, 3 Camp. 296.

(*h*) Henry *v.* Raiman, 25 Penn. State, 354.

(*i*) From the elaborate provisions of the statutes, which relate not only to simple contracts, but to agreements under seal, criminal and civil actions of various sorts, conveyances of real estate, judgments, &c., we will condense such matters as more particularly concern promissory notes and bills.

The time of bringing a suit on a simple contract debt, such as that evidenced by a note or bill, is limited by a definite period for each State, three, four, five, or six years, as the case may be, after the right of action has accrued.

In Arkansas, Delaware, Maryland, North Carolina, and Tennessee, the period of limitation after which suits upon account, assumpsit, or case, founded on any simple contract, expressed or implied, cannot be brought, is *three* years. In South Carolina, Texas, and California, the period is *four* years. In Florida, Illinois, Indiana, Kentucky, Missouri, and Virginia, *five* years. In the United States jurisdiction, in Alabama, Connecticut, Georgia, Iowa, Massachusetts, Maine, Michigan, Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and Wisconsin, the period is *six* years. In almost all these statutes there are savings and exceptions in favor of persons affected with certain disabilities. Such are, in all the States, — 1. infants; 2. insane persons; 3. married women. To these may be added, in most, if not all the States, persons imprisoned for certain periods, e. g. imprisoned on a criminal charge or execution upon conviction of a criminal offence, for a term less than life.

The statute provides, in such cases, that the time during which the disability operates shall not be reckoned in the computation of the period of limitation, but that the statute shall begin to run from the removal of the disability. This rule is nearly universal, though not absolutely so. Thus, in Wisconsin, no disability can protract the operation of the statute more than five years, except in case of infancy; in the latter case, the minor cannot be sued till he comes of age.

In general, after the disability is removed, the statute begins to run, and at the

originally enacted in England more than two centuries since, —

expiration of the usual term, the debt is barred. But in some States a briefer period is granted in case some portion has already been consumed by a disability which has been pleaded. Thus in the United States courts the additional period allowed is three years. In Delaware it is one year. In all other cases, we think, the statute runs its usual time upon simple contract debts, after the disability is removed.

It is enacted in many States, that a person who has left the State or resides out of it, or (in some statutes) whose place of residence is unknown, although in the State at the time when the cause of action accrues, may be sued within the time limited by the act, after his return or removal to the State, or after his place of residence, if within the State, becomes known. So see, for example, the Ohio and California Statutes of Limitations. In Delaware, Georgia, and perhaps other States, there is no saving in favor of foreigners or citizens of other States.

It is enacted in many States, that if any alien subject or citizen of any State which is an enemy of the United States shall sue a simple contract debt, the Statute of Limitations does not run until the end of the war. So it is in Massachusetts, Michigan, New York, Vermont, California.

In New York, Wisconsin, California, and many other States, it is specially enacted that no person shall avail himself of a disability, unless it existed when his right of action accrued. And when two or more disabilities shall coexist at the time the right of action accrued, the limitation shall not attach until they are all removed.

Sometimes a provision enacts that actions founded on contract between persons resident at the time of the contract without the State, which are barred by the laws of the country or State where the contract was made, are barred in the courts of the State where the action is brought. So see statutes of Ohio. So in Texas, if the debt is barred by the statute of the State from which the emigrant came, it is barred in Texas also, though the latter statute be longer in its period of limitation. But the whole period prescribed by the statute of the foreign State must have elapsed. Hays *v.* Cage, 2 Texas, 501. The Texas act applies no less to foreign than to domestic claims. In general, and in the absence of statute provisions, as we shall illustrate hereafter, it is not the *lex loci contractus*, but the *lex fori*, that regulates the plea of the statute of limitations, and decides its applicability.

In all the States, we believe, accounts such as concern the trade of merchandise between merchant and merchant, their factors, agents, and servants, are excepted from the operation of the statute, at least in actions on the account, and in some cases in debt or assumpsit on the same. In many States the statute bar is expressly removed from any application to bills, notes, or other evidences of debt which may be issued by banks or other moneyed corporations, or issued and put in circulation as money. See the statutes of New York, Massachusetts, Louisiana, Vermont, Arkansas. Harsh *v.* Hanauer, 15 Ark. 252. But the North Carolina statute applies to all bonds, bills, and other securities made transferable by law, after the assignment or indorsement thereof, in the same manner as it operates against promissory notes. In Louisiana, the prescription is five years for actions on bills of exchange or promissory notes to order or bearer, except bank-notes, and for actions and all effects negotiable or transferable by indorsement or delivery. This does not apply to judgments, nor to due-bills not negotiable. Hill *v.* Tucker, 13 How. 458; Goodall *v.* Tucker, id. 469.

A distinction is drawn in many States between sealed or attested promissory notes and notes not under seal and not witnessed. The former run through a longer course before the bar falls on them. Thus, in Massachusetts, if the note is signed in presence of attesting witnesses, and the action be brought thereon by the original payee or

the first was in the year 1623,(*j*) — and they have subsequently passed through many changes; but the change in the judicial view of them and the judicial treatment of them is still greater. Formerly they were regarded with distrust and dislike; now they are favored,(*k*) and a liberal construction given to their provisions (*l*) both at law and in equity.(*m*) Formerly they

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his executor or administrator, the statute provision for six years does not apply. In Connecticut, actions on specialties and promissory notes under seal are not barred till the lapse of seventeen years; those on unsealed notes, in six. In Vermont, a note signed in the presence of attesting witnesses has fourteen years to run before it is barred. See *supra*, section on Alterations.

The Illinois limitation act of Nov. 5th, 1849, does not embrace bills of exchange and promissory notes, but relates exclusively to unwritten contracts. Dunlap *v.* Buckingham, 16 Ill. 109. The act of 1843, in Iowa, fixes the period of limitation at six years. Forsyth *v.* Ripley, 2 Greene, Iowa, 181. The previous act of 1839 required five years only. Maltby *v.* Cooper, Morris, 59. As to the former's provisions respecting promissory notes, see Bennett *v.* Bevard, 6 Iowa, 82. We shall presently see that the operation of the statute may be interrupted by a new promise to pay, or an acknowledgment of the debt sufficient in character to carry an implied promise to pay. Several statutes have enacted that no such acknowledgment or new promise shall be effectual to revive the debt otherwise barred, unless it be in writing, and subscribed by the party to be charged thereby. Such are the statutes of New York, Wisconsin, California.

In Massachusetts, if the defendant shall have fraudulently concealed from the plaintiff that he had a right of action, the statute shall not run, as ordinarily, from the time that right accrued, but only from the plaintiff's discovery of that right. So it is in Michigan. In other States, what is here provided by statute is settled by judicial decisions, as we shall soon state.

(*j*) The first statute limiting the time of bringing personal actions was 21 Jac. 1, ch. 16, and is still in operation in England. Similar provisions for real property had long before existed. The most important section of this act for our notice is the third, which declared that no action of case or debt should be brought upon any simple contract — except in case of "merchants' accounts" — after the lapse of six years from the time the cause of action accrued. But it was specially provided by section seventh, that against one subjected to infancy, coverture, insanity, imprisonment, or absence beyond the seas, the statute should begin to run only from the removal of these disabilities. In France, by the commercial code, the statute period of limitation on bills and notes is five years, running from protest. But the promisors, or, if they are deceased, their representatives, are compellable to testify on oath that the debt is paid, in getting relief under the statute.

(*k*) The plea of the statute of limitations is not an unjust or discreditable defence. Penley *v* Waterhouse, 3 Iowa, 418; Chambers *v.* Garland, 3 Greene, Iowa, 322; Kyle *v.* Wells, 17 Penn. State, 286; Gillingham *v.* Gillingham, id. 302.

(*l*) The statutes of limitation are statutes of repose, founded on sound policy, and not to be evaded by forced construction. Roberts *v.* Pillow, 1 Hempst. 624. They should be regarded with favor by the courts, and in all cases be liberally construed. Phillips *v.* Pope, 10 B. Mon. 163; Gautier *v.* Franklin, 1 Texas, 732.

(*m*) The statute does not apply in terms to suits in equity, but courts of equity generally adopt it to guide their decisions. Johnson *v.* Smith, 2 Burr. 950, 961; Prince *v*

were regarded as statutes of *evidence*, making a term of time without demand serve as proof of payment, on the ground that in most cases it was so in fact. And thence grew up the earlier rules, in which almost any kind or measure of oral recognition

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Heylin, 1 Atk. 493; Stackhouse *v.* Barnston, 10 Ves. 453; Ferson *v.* Sanger, Daveis, 252. Thus, if a testator by will provide for the payment of his debts, a court of equity will not allow the devise to revive any debt barred during the life of the testator by the statute; though after such a devise no claim not barred at the testator's death will be barred for the future in a court of equity. Jones *v.* Scott, 1 Russ. & M. 255; Hughes *v.* Wynne, 1 Turner & R. 307; Hargreaves *v.* Michell, 6 Madd. 326; Burke *v.* Jones, 2 Ves. & B. 275. So a debt not barred at the time of a decree in insolvency cannot be barred afterwards. Ex parte Ross, 2 Glyn & J. 331; Ex parte Fenwick, 2 Deac. 27; Barton *v.* Tattershall, 1 Russ. & M. 237. In cases of concurrent jurisdiction, as of fraud, equity sometimes goes further than law, and grants prescription after a lapse of time which would not have barred the claim at law under the statute. Ferson *v.* Sanger, Daveis, 252. In this country, as in England, in all cases of concurrent jurisdiction of law and equity, the statute has been pronounced equally obligatory in each court. Hertle *v.* Schwartze, 3 Md. 366; Gunn *v.* Brantley, 21 Ala. 633; Nimmo *v.* Stewart, id. 682; Crocker *v.* Clements, 23 id. 296. Where a party is an equitable trustee, by holding a confidential relation by act of law or by agreement, the statute of limitations does not run against the rights, claims, and duties incident to such relation, until it is ended. Blount *v.* Robeson, 3 Jones, Eq. 73; Sayles *v.* Tibbitts, 5 R. I. 79; Fisk *v.* Wilson, 15 Texas, 430; Colbert *v.* Daniel, 32 Ala. 314; Shibla *v.* Ely, 2 Halst. Ch. 181. If a trust is existing, and an estate to be administered in a court, a claim against the estate will not be barred by the statute in that court. Playfair *v.* Cooper, 17 Beav. 187, 23 Eng. L. & Eq. 329. For like reasons the statute does not apply to the widow's claim for dower. Kiddall *v.* Trimble, 1 Md. Ch. 143; Tooke *v.* Hardeman, 7 Ga. 20; Chapman *v.* Schroeder, 10 Ga. 321; May *v.* Rumney, 1 Mich. 1; Wright *v.* Conover, 2 Halst. 482, 613. Yet dower may be barred by lapse of time. Kiddall *v.* Trimble, 1 Md. Ch. 143. So the statute is not applicable to the accounting of a guardian in court for his trust. Gregg *v.* Gregg, 15 N. H. 190. Though here, as in dower, lapse of time raises a presumption of discharge. Ibid. For we must remember that the statute of limitations does not abrogate the old common-law presumption of payment from lapse of time. Sanderson *v.* Olmsted, 1 Chandl. Wis. 190. And hence cases not included in the statute may yet become stale by age. In like manner, it does not run against the charges of a guardian in his guardianship account. Mathes *v.* Bennett, 1 Fost. 204. Nor is it applicable to the balance of a claim against the estate of a deceased insolvent, on which a dividend has been paid. Bancroft *v.* Andrews, 6 Cush. 493. But the principle in these and similar examples is, that the trusts intended by equity not to be subjected to the statute of limitations are those technical and continuing ones which are not at all cognizable at law, but which appertain peculiarly, and perhaps exclusively, to the courts of chancery. White *v.* White, 1 Md. Ch. 53; Thomas *v.* Brinsfield, 7 Ga. 154; Johnson *v.* Smith, 27 Misso. 591; Presley *v.* Davis, 7 Rich. Eq. 105; Tinnen *v.* Mebane, 10 Texas, 246; Zacharias *v.* Zacharias, 23 Penn. State, 452; Heckert's Appeal, 24 id. 482; McDowell *v.* Goldsmith, 6 Md. 319; King *v.* Hamilton, 16 Ill. 190; Paff *v.* Kinney, 1 Bradf. 1; Carter *v.* Bennett, 6 Fla. 214; Manion *v.* Titsworth, 18 B. Mon. 582; Philips *v.* State, 5 Ohio State, 122. Such, for additional example, are those between administrators and distributees; and hence a claim to a legacy is not within the statute,

of the debt took it out of the statutes of limitations. More recently, and at present, they are viewed as statutes of peace ;(*n*) grounded on the injustice and mischief of permitting a stale but unsatisfied claim to be revived and enforced. And hence

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except it be by express provision. Perkins *v.* Cartmell, 4 Harring. Del. 270; Presley *v.* Davis, 7 Rich. Eq. 105; Tinnen *v.* Mebane, 10 Texas, 246. The statute is not applicable to the claim of one of two administrators, or to the claim of an executor against the estate; for he cannot sue himself at law. Brown *v.* Stewart, 4 Md. Ch. 368; Spencer *v.* Spencer, id. 456. But a legatee has been allowed to interpose a bar against such a claim of the executor. Hoch's Appeal, 21 Penn. State, 280. In Louisiana, the action to recover a legacy is barred by a prescription of ten years. Nolasco *v.* Lurty, 13 La Ann. 100. But trusts not directly included within the class named above are subject to the bar of the statute. This is the ground of the rule already given, under which actions cognizable equally at law and in equity are subjected in the latter tribunal to the statute. The partnership relation is not one of the technical and continuing trusts above described, since a bill for mere account and settlement between partners is barred by the statute. Adams *v.* Taylor, 14 Ark. 62; Prewett *v.* Buckingham, 28 Missis. 92. In like manner, the statute is applicable to an agent who receives money for another, and does not pay it over within a reasonable time. For he is not sufficiently a trustee to be excepted under the statute. Hickok *v.* Hickok, 13 Barb. 632; Denton *v.* Embury, 5 Eng. Ark. 228. But when the trust is closed and disavowed, and the relation ceases, the statute begins to run. And so it is even with an express trust, when the trustee assumes open, absolute, and adverse possession and ownership, denying the ownership of his *cestui que trust*, and the latter has knowledge of his adverse possession. Tinnen *v.* Mebane, 10 Texas, 246; Robertson *v.* Wood, 15 id. 1; Keaton *v.* Greenwood, 8 Ga. 97. Still direct notice to the *cestui que trust* of adverse perversion, or some such notorious act as will justify the presumption of notice to him, must be proved, and before the statute can run against his claim. Grumbles *v.* Grumbles, 17 Texas, 472. Even though the actual trust be terminated, the statute does not run between the trustee and his *cestui que trust* so long as the latter is under undue influence of the trustee, or circumstances indicate that he probably is so. Keaton *v.* McGwier, 24 Ga. 217; Wellborn *v.* Rogers, id. 558; Jones *v.* Godwin, 10 Rich. Eq. 226; Airey *v.* Holmes, 5 Jones, Law, 142. When the statute applies to property adversely held, it is said, the statute acts on the title; and, if the bar is perfect, transfers it to the adverse possessor; so that a title vicious in inception ripens into a perfect one by mere lapse of time. But when it applies to contracts to pay money there is no adverse possession, but the statute annuls the remedy on the contract, not affecting the debt itself. Jones *v.* Jones, 18 Ala. 248; Newcombe *v.* Leavitt, 22 id. 631. The same court holds that their statute of six years' limitation is a bar in equity to the enforcement of an implied trust relative to personal property. Martin *v.* Branch Bank at Detroit, 31 Ala. 115. In Texas, the statutes of prescription have no direct application to suits for specific performance. Holman *v.* Criswell, 15 Texas, 394; Vardeman *v.* Lawson, 17 id. 10. An equitable estoppel will not debar a party in a court of law from pleading the statute of limitations. Bank of Hartford Co. *v.* Waterman, 26 Conn. 324.

(*n*) Norris *v.* Slaughter, 1 Greene, Iowa, 338. Its object is not to create a presumption of payment, or to furnish evidence of payment, after the allotted time, but to close the judicial tribunals against their prosecution. Pritchard *v* Howell, 1 Wis. 131; Roberts *v.* Pillow, 1 Hempst. 624; Phillips *v.* Pope, 10 B. Mon. 163.

the courts would not permit the effect of the statute to be removed, unless by a distinct acknowledgment or promise, because from this it might be inferred that the debt ought to be satisfied. Hence arose a great uncertainty as to what acknowledgments were sufficient to remove the statute. This uncertainty was put an end to by Lord Tenterden's act (9 Geo. IV. ch. 14, § 1) in England, and in those of our States which have copied this act.

This statute provides that no promise or acknowledgment by words only shall take a case out of the statute, unless these words are written and signed by the party to be charged by them. But a new promise or acknowledgment by *act*, as by payment of principal or interest, is left as it stood before.

The statute of limitations, since Lord Mansfield's day at least, is held to affect the remedy only, and not the debt.(*o*) Important consequences flow from this; (*p*) for example, the debtor himself may avail himself of the statute, but no third party can; (*q*) moreover, if one has debt on a simple contract, and a

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(*o*) Quantock *v.* England, 5 Burr. 2628; Mavor *v.* Pyne, 2 Car. & P. 91; Waltermire *v.* Westover, 14 N. Y. 16; Billings *v.* Hall, 7 Calif. 1; Jones *v.* Jones, 18 Ala. 248; Briscoe *v.* Anketell, 28 Missis. 361; Ruckmaboye *v.* Mottichund, 8 Moore, P. C. 4, 32 Eng. L. & Eq. 84; Winston *v.* McCormick, 1 Smith, Ind. 8. It is in this particular that the statute of limitations differs from the civil-law doctrine of prescription, because the former affects the remedy only, and not the obligation of the contract, while the latter affects the right. Billings *v.* Hall, 7 Calif. 1.

(*p*) Since the statute applies only to the remedy, and does not affect the debt, it has been held in the English courts, that the statute bar must be specially pleaded, and not introduced under another issue; and that the court cannot presume that the remedy is barred, although the claim appears to be of more than six years' standing. Swayne *v.* Wallinger, 2 Stra. 746; Higgins *v.* Scott, 2 B. & Ad. 413; Chapple *v.* Durston, 1 Cromp. & J. 1; Draper *v.* Glassop, 1 Ld. Raym 153; Williams *v.* Jones, 13 East, 439; Scarpellini *v.* Atcheson, 7 Q. B. 864; Dixon *v.* Dixon, 1 Md. Ch. 271. In Mississippi it has been held that an executor or administrator under the general issue may avail himself of the statute of limitations. Sanders *v.* Robertson, 23 Missis. 389. In Texas, it is said that the statute must be pleaded specially, but whether by demurrer or in a general answer is immaterial. Hopkins *v* Wright, 17 Texas, 30. If there are no pleadings on either side, the statute is available, though not formally pleaded. Reynolds *v.* Lansford, 16 id. 286.

(*q*) Hence a bankrupt may waive the bar of the statute, and the holder of the note will get his dividend from the effects; for the petitioning creditor's debt of over six years is good against strangers, though not against the bankrupt. Quantock *v.* England, 5 Burr. 2628. Third persons cannot set up the defence of the statute. Ibid.; Mavor *v.* Pyne, 3 Bing. 285; Williams *v.* Jones, 13 East, 439; Chapple *v.* Durston, 1 Cromp & J. 1. In equity, the statute is a defence to him alone who pleads it. Dixon *v.* Dixon, 1 Md. Ch. 271. And both at law and in equity it can only be

lien on a chattel to secure that debt, the lien is unaffected by lapse of time; (*r*) so if one gives a note, and a mortgage to secure it, although the note cannot be sued after six years, the mortgage is just as effectual as it was before.(*s*) We give in the note other examples of important consequences of the doctrine.(*t*)

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pleaded by the party in whose direct favor it operates, and those claiming under him. Dawson *v.* Callaway, 18 id. 573.

(*r*) In re Broomhead, 16 Law J., Q. B. 355, 5 Dowl. & L. 52; Spears *v.* Hartley, 3 Esp. 81. The right to enforce a vendor's lien, says one case, is barred by the same lapse of time which would bar the debt. Littlejohn *v.* Gordon, 32 Missis. 225.

(*s*) Sparks *v.* Pico, 1 McAllister, C. C. 497; Dilworth *v.* Carter, 32 Missis. 206; Chouteau *v.* Burlando, 20 Misso. 482. These and the similar cases hold that the remedy to foreclose a mortgage is not barred by such time as bars an action upon the notes secured by the mortgage. See *contra*, Duty *v.* Graham, 12 Texas, 427. The fact that a mortgage is given with the note, and to secure it, does not, of course, prevent the statute from barring the note. So it is even when the plaintiffs have been and still are enjoined from selling the property put in mortgage. State Bank *v.* Byrd, 14 Ark. 496. But often if a note is barred by the statute, the creditor may have a statutory remedy to foreclose the mortgage, in satisfaction of his debt. Elkins *v.* Edwards, 8 Ga. 325.

(*t*) *First.* It results furthermore from the doctrine that the statute of limitations applies to the remedy only, and not to the obligation itself, that the statute in force at the place where the remedy is sought is the only one which governs, as we have seen in the chapter on the Law of Place. In Massachusetts, a witnessed note made by and to, and sued between, citizens of that State, is not subject to the limitation of six years which attaches to ordinary unattested notes. But if such a note be carried to another State, where there is no such immunity for witnessed notes, and there sued, the statute of the latter State will bar the note in the ordinary time. Nicolls *v.* Rodgers, 2 Paine, C. C. 437. So, if the resident of one State executes a note as surety, to be paid in another State, the statute of prescription in the latter State will govern the case. Kellar *v.* Sinton, 14 B. Mon. 307. The action on a judgment is frequently excepted from the period within which the original action itself must have been brought to escape the statute bar. And in order that foreign judgments may be also exempt from the statute bar, decisions and statutes have placed them upon the same footing with domestic judgments, in some tribunals. But even here the law of the forum of the second action, and not the law of the forum which pronounced judgment originally, will determine the limitation. A judgment of a justice of the peace of another State is not the judgment of a court of record, within the Massachusetts Revised Statutes, and an action thereon is barred in six years, although by the laws of the other State an execution might still be issued on that judgment. Mowry *v.* Cheesman, 6 Gray, 515.

Secondly. Since, also, it is the remedy alone which is operated upon (except in the perfecting of title for personal chattels, as in note *r*, *supra*), the statute which is in force at the time the suit is brought is the one by which the cause must be judged, and not one which may have been in operation at the time the cause of action accrued. It is evident, therefore, that, though ordinarily we speak of a contract as being made with reference to the existing laws, yet the statute of limitations forms no part of a bargain for the price of goods or for the payment of money. It is the prescriptive statute in force at the time of the suit that must be looked at, and not one in force at some

There are important exceptions, which are quite similar in the English and all the American statutes, in favor of persons who had no power, or an imperfect power, of enforcing their claims by suit. These exceptions relate to infants,(*u*) married

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anterior date. Hence the statute of limitations affects ordinarily antecedent contracts. It is retrospective. Winston *v.* McCormick, 1 Ind. 56; Sleeth *v.* Murphy, Morris, 321; Phares *v.* Walters, 6 Iowa, 106; Montgomery *v.* Chadwick, 7 id. 114; State *v.* Swope, 7 Ind. 91; State *v.* Clark, id. 468. Thus, a suit was brought, Jan. 27, 1849, upon a note on demand dated Oct. 1, 1838 A new statute of limitations took effect March 1, 1843, at which time the note was not barred by the former statute. It was held that the new statute was the one applicable to the action. Gilman *v.* Cutts, 3 Foster, 376. See Henry *v.* Thorpe, 14 Ala. 103.

But though the statute of limitations may apply to causes of action already existing, it should not, it seems, cut off all remedy, and a reasonable time should be granted. West Feliciana R. R. *v.* Stockett, 13 Smedes & M. 395. And it has been held that the claimant may always, by reasonable diligence, save his claim by a suit, when a new statute of limitations is passed. Willard *v* Harvey, 4 Foster, 344. And see Wires *v.* Farr, 25 Vt. 41. But if once the time expire, and the statute bar fall, the remedy is gone, and no subsequent statute can revive it. The title in the possessor is then complete, it has been said, even though the property be afterwards removed to another State, having a longer period of prescription. Howell *v.* Hair, 15 Ala. 194. And on the former point, Stipp *v.* Brown, 2 Ind. 647; Winston *v.* McCormick, 1 id. 56 M'Kinney *v.* Springer, 8 Blackf. 506. If a statute of limitations is unconditionally repealed, and a new one passed, the time that the debt was due and payable under the old law cannot be added to the existence of the new law, to bar the suit. Forsyth *v.* Ripley, 2 Greene, Iowa, 181. And if the statute be changed before perfecting a bar, and a different period prescribed, the time that has expired is to be excluded, and the full term set by the new law must elapse after its passage. Cox *v* Davis, 17 Ala. 714. And so the prescription partly run in one State cannot be added to the prescription partly run in another, so as to bring the case within the statute of this latter State. Perry *v.* Lewis, 6 Fla. 555. Where notes on which an usurious interest was taken, were paid by notes of third persons, among which was the note of one who afterwards sued to recover the usury, given and passed in different transactions, the action for usury was governed by the statute of limitations in force when the original notes were passed. Martin *v.* Martin, 12 B. Mon. 304. Finally, the legal status of parties, at the time of the remedy, is, we should say, material to be regarded, rather than their condition at the time of contract, in observing the effect of the statute. Thus, if A be surety for B on a note, and B plead infancy and get judgment in his favor by that defence, but judgment be against A for the debt, A becomes sole debtor thenceforth; and failure to sue out execution against him is to be measured by provisions concerning principal debtors, and not those concerning sureties, if the latter be distinct. Short *v.* Bryant, 10 B. Mon. 10. While in this country and in England, as we have now seen, the efficient statute is the *lex fori*, in France, as it appears, the *locus contractus* furnishes the statute of limitations for the court which listens to the remedy. 6 Pardes. No. 1495.

(*u*) Prideaux *v.* Webber, 1 Lev. 31; Wych *v.* East India Co., 3 P. Wms. 309; Shannon *v* Dunn, 8 Blackf. 182; Bennett *v.* Williamson, 8 Ired. 121; Woodward *v.* Clarke, 4 Strobh. Eq. 167; Bacon *v.* Gray, 23 Missis. 140. In Texas, the exception in favor of an infant *feme sole* is removed on her marriage, for by that act, in the Texas

women,(*v*) lunatics,(*w*) and persons imprisoned, or beyond seas, or out of the jurisdiction.(*x*)

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code, she becomes of full age. White *v.* Latimer, 12 Texas, 61. And in Ohio it has been decided, that the statute runs against an infant *feme sole* from her arrival at eighteen years, and not at twenty-one. Slater *v.* Cave, 3 Ohio State, 80. In general, the saving is removed from the infant on his arriving at age, and he has the statute period thereafter. Papot *v.* Trowell, 8 Rich. 234; Adams *v.* Torry, 26 Missis. 499. So it is in the case of a *tort feasor* who converted the infant's property, even though the property be removed beyond the State, meanwhile, unless a longer period be given by statute. Jordan *v.* Thornton, 7 Ga. 517. The grantee or the releasee of an infant cannot set up the latter's disability. Williams *v.* Conneil, 4 Jones, 206.

(*v*) The statute does not run against a *feme covert* till discoverture, and then it begins. Meegan *v.* Boyle, 19 How. 130; Reaume *v.* Chambers, 22 Misso. 36; Marple *v.* Myers, 12 Penn. State, 122; McLean *v.* Jackson, 12 Ired. 149; Shallenberger *v.* Ashworth, 25 Penn. State, 152; Flynt *v.* Hatchett, 9 Ga. 328; Sharp *v.* Head, 11 B. Mon. 277; Fatheree *v.* Fletcher, 31 Missis. 265; Friley *v.* White, id. 442. It runs from the time of her discoverture, with a knowledge of her right of claim. Smith *v.* Atwood, 14 Ga. 402. Against the widow's right to dower it runs only from the time she demands dower, and gets a right to a writ of dower, and not from the death of her husband. Robie *v.* Flanders, 33 N. H. 524. See further Wellborn *v.* Rogers, 24 Ga. 558; Gray *v.* Adams, 19 Ark. 289; Jones *v.* Godwin, 10 Rich. Eq. 226.

(*w*) Little *v.* Downing, 37 N. H. 355. It runs from the time that the insanity is removed, and the restored party has knowledge of his contract. Dicken *v.* Johnson, 7 Ga. 484.

(*x*) In many of the statutes, if not all, foreigners resident out of the State, and citizens absent therefrom, are not subject to the statute so long as they are absent, and the time of their absence is deducted in the statute reckoning. In general, see King *v.* Walker, 1 W. Bl. 286; Parnther *v.* Gaitskell, 13 East, 432; Koch *v.* Shepherd, 18 C. B. 291, 37 Eng. L. & Eq. 221; Towns *v.* Mead, 16 C. B. 123, 29 Eng. L. & Eq. 271; Forbes *v.* Smith, 11 Exch. 161, 30 Eng. L. & Eq. 600; Clements *v.* Brown, 31 Missis. 93; Boyle *v.* Arledge, 1 Hempst. C. C. 620; Gilman *v.* Cutts, 3 Foster, 376; Christophers *v.* Garr, 2 Seld. 61; Alexander *v.* Burnet, 5 Rich. 189; Bruce *v.* Flagg, 1 Dutch. 219; Thomas *v.* Black, 22 Misso. 330; Varney *v.* Grows, 37 Maine, 306; Bucknam *v.* Thompson, 38 id. 171; Seymour *v.* Deming, 9 Cush. 527; Crocker *v.* Arey, 3 R. I. 178; Stevens *v.* Foster, 30 Vt. 200; Hewlett *v.* Hewlett, 4 Edw. Ch. 7; Aikin *v.* Bailey, 5 Eng. Ark. 580; Hackett *v.* Kendall, 23 Vt. 275. See Hale *v.* Lawrence, 1 N. J. 714. The older English statutes contained a saving in favor of those "out of the realm." The statute 24 Jac. 1., ch. 16, changed the expression to "beyond the seas," in order to include Scotland. Under the 3 & 4 Wm. IV. ch. 42, § 7, none of the British Isles is "beyond the seas." Nightingale *v.* Adams, 1 Show. 91. In adopting closely, if not entirely, the English statutes of limitation, as many of our States have, the expression "beyond seas" has been generally retained, and accordingly adjudication has been necessary to ascertain its meaning. "Beyond seas" commonly means beyond the limits or jurisdiction of the State. Murray *v.* Baker, 3 Wheat. 541; Shelby *v.* Guy, 11 id. 361; Stephenson *v.* Doe, 8 Blackf. 508; Richardson *v.* Richardson, 6 Ohio, 125; Thomnson *v.* Odum, 23 Ala. 480; Bank of Alexandria *v.* Dyer, 14 Pet. 141. In Texas there is no such saving phrase as beyond the seas or absence from the State. Maverick *v.* Salinas, 15 Texas, 57. In the courts of Pennsylvania, Michigan, and Missouri, the phrase "beyond the seas" means out of the limits of the United States. Gonder *v.* Estabrook, 33 Penn. State, 374;

Courts do not imply exceptions from the equity of a case, nor on any other ground than the express provisions of the

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Keeton *v.* Keeton, 20 Misso. 530; Marvin *v.* Bates, 13 Misso. 217; Fackler *v.* Fackler, 14 id. 431; Darling *v.* Meachum, 2 Greene, Iowa, 602. In England, the phrase means "out of the territories," "out of the realm," and it is not to be interpreted literally. Ruckmaboye *v.* Mottichund, 8 Moore, P. C. 4, 32 Eng. L. & Eq 84. It will be observed, from the preceding cases, that foreigners are within the saving of the statute, and that they have the statute period after coming to the country or State for bringing their action. Strithorst *v.* Graeme, 2 W. Bl. 723; Le Veux *v.* Berkeley, 5 Q. B. 836; Townsend *v.* Deacon, 3 Exch. 706; Lafond *v.* Ruddock, 13 C. B. 812, 24 Eng. L. & Eq. 239; Way *v.* Sperry, 6 Cush. 238; State Bank *v.* Seawell, 18 Ala. 616; Ford *v.* Babcock, 2 Sandf. 518. In some States, however, as Arkansas, Texas, and Indiana, there appears to be no exception made in favor of non-residents. Carneal *v.* Thompson, 4 Eng. Ark. 55; Brian *v.* Tims, 5 id. 597; Jones *v.* Hays, 4 McLean, 521; Maverick *v.* Salinas, 15 Texas, 57.

But the action on a note made in another State by citizens thereof to residents of New York is not barred till six years after the maker comes into New York, and the New York statute governs the case. Carpenter *v.* Wells, 21 Barb. 593. So it is in Massachusetts. Way *v.* Sperry, 6 Cush. 238. Where the maker was a non-resident at the making, but returned to Georgia after the maturity of the note, the statute ran against the holder from this return, when first the note became suable. Howell *v.* Burnett, 11 Ga. 303. If both parties were non-residents at the time of contracting the debt, and the defendant removes into the State, the statute does not run in his favor until he comes into the State. Tagart *v.* Indiana, 15 Misso. 209. It is said that the statute only begins to run again from the open and notorious return of the debtor, so that he may be sued again; and if not actually known to the plaintiff, still the return must be so public and unconcealed, that he might have known it by the use of ordinary diligence. Ford *v.* Babcock, 2 Sandf. 518; Dorr *v.* Swartwout, 1 Blatchf. C. C. 179; Ingraham *v.* Bowie, 33 Missis. 17. There is some discrepancy in the cases upon the meaning of the words "residing abroad," and the equivalent phrases. Thus, it has been held that to "reside out" means to be without a home in the State, and not merely the remaining absent from the State. Drew *v.* Drew, 37 Maine, 389. So, also, the statute has been said to require constant absence and change of residence, and does not consist with the debtor's visiting his family every fortnight, who remain in the State, and paying taxes there. Gilman *v.* Cutts, 7 Foster, 348. So if the debtor leave without the *animus revertendi*, the statute does not bar the debt. But if with that *animus*, it is barred. Ayres *v.* Henderson, 9 Texas, 539; Garth *v.* Robards, 20 Misso. 523. And so it is held that the several periods of absence can never be added together, and their sum deducted from the total period which has elapsed since the cause of action accrued. Ingraham *v.* Bowie, 33 Missis. 17. It was held that only one absence and return is provided for by the New York Revised Statutes, and that its provisions did not apply to a second departure, in Dorr *v.* Swartwout, 1 Blatchf. C. C. 179. And, in the same State, that a continuing absence from, and residence out of, the State must both concur, to avoid the bar. Wheeler *v.* Webster, 1 E. D. Smith, 1. So in Vermont. Hall *v.* Nasmith, 28 Vt. 791. On the other hand, it has been held that successive absences of the defendant, whether permanent or temporary, are to be subtracted from the total lapse of time. Berrien *v.* Wright, 26 Barb. 208; Harden *v.* Palmer, 2 E. D. Smith, 172. Thus, if a person is absent on business or for pleasure, — as, for a trip to Europe, on two occasions of six months

statute.(*y*) Nor can disabilities be tacked one upon an other.(*z*)

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each, — a year is to be deducted from the time elapsed. So held in Harden *v.* Palmer, *supra*. And see Ford *v.* Babcock, 2 Sandf. 518; Didier *v.* Davison, 2 Barb. Ch. 477, cited by *Daly*, J. in the opinion. See Wheeler *v.* Webster, *supra*. Absence and residence out of the State shall not be taken as part of the statute period. Darling *v* Wells, 1 Cush. 508; Pratt *v.* Hubbard, 1 Greene, Iowa, 9. And so it is in New York, though the party may frequently return on business to the State, while residing abroad. Burroughs *v.* Bloomer, 5 Denio, 532. But if the debtor die while absent from the State, the statute runs immediately from his death. Teal *v.* Ayres, 9 Texas, 588; Ayres *v.* Henderson, id. 539. The statute does not run against the payee of a note, a citizen of New Brunswick, where the note was made, until he comes within the limits of the United States, though the maker may have resided in the State where the action was brought during eleven years before the cause of action. McMillan *v.* Wood, 29 Maine, 217. On the other hand, it has been held in Missouri, that the absence of the plaintiff from the State does not prevent the statute from running in favor of the defendant, a resident of the State. Smith *v.* Newby, 13 Misso. 159. In England, if only one of several plaintiffs be resident at home, yet the statute will run as usual. Perry *v.* Jackson, 4 T. R. 516. But if any one of several co-defendants in an action *ex contractu* be abroad, the statute does not run until his return. Fannin *v.* Anderson, 7 Q. B. 811. A mere setting foot on English ground has been held no return, within the statute. Gregory *v.* Hurrill, 1 Bing. 324. In Massachusetts, it runs from the time the debtor is in the State, though carried there under a warrant for crime, and imprisoned there. Turner *v.* Shearer, 6 Gray, 427. The time of absence before losing the domicil is to be reckoned in the computation of absence. Collester *v.* Hailey, 6 Gray, 517. And the exception as to absent parties has been held applicable to foreign corporations which have no attachable property in the State. Hall *v.* Vt. & Mass. R. R. Co., 28 Vt. 401. *Contra*, Olcott *v.* Tioga R. R., 26 Barb. 147, on the ground that a corporation cannot be considered a person, within the language and scope of the statute. In some States, the exception with regard to absent parties does not apply, if the absent party has had attachable property in the State, "at any time or at various times," for the full statute period since the cause of action accrued. Russ *v.* Fay, 29 Vt. 381; Stoughton *v.* Dimick, id. 535; Dow *v.* Sayward, 14 N. H. 9. But though a party leave property in the State, yet if his absence is such that process cannot be served on him, his case is excepted from the statute bar. Ward *v.* Cole, 32 N. H. 452. In Connecticut, the provision applies to parties resident abroad at the time of the contract, and until the action brought. Hatch *v.* Spofford, 24 Conn. 432. In Louisiana, the distinction between residents and non-residents, as to the statute of limitations, has been abolished. Tate *v.* Garland, 12 La. Ann. 525. To a plea of the statute by a surety sued on his note, a replication that the defendant had removed out of the county where the note was given, before the expiration of the time given for suing sureties, and thereby obstructed the bringing of this suit, was held good. Prather *v.* Ross, 10 B. Mon. 15.

(*y*) Pryor *v.* Ryburn, 16 Ark. 671; Dozier *v.* Ellis, 28 Missis. 730; Bucklin *v.* Ford, 5 Barb. 393.

(*z*) That is, if where the cause of action accrued, there was only one disability, others subsequently arising cannot afterwards be pleaded. But if there were two, as infancy and coverture, when the cause of action accrued, both would have to be removed before the statute bar can attach. Hence, where a right to sue accrues for an infant female, the statute runs when she comes of age, though she had been

In Massachusetts, Maine, and Vermont, witnessed notes are excepted by statute from the limitation applied to unwitnessed notes,(*a*) whether negotiable or not. In relation to negotiable promissory notes, the most important principle is this: that a promise which takes off the bar of the statute of limitations enures to the benefit, not of him only to whom the promise is made, but of all other parties to the note. And, in general, if the statute attaches to any note in the hands of any holder,(*b*)

previously married. And, in general, cumulative disabilities are not allowed under the statutes. Thorp *v.* Raymond, 16 How. 247; Clarke *v* Cross, 2 R. I. 440; Scott *v.* Haddock, 11 Ga. 258; Keeton *v.* Keeton, 20 Misso. 530; Clark *v.* Jones, 16 B. Mon. 121; White *v.* Latimer, 12 Texas, 61; Ford *v.* Clements, 13 id. 592; Martin *v.* Letty, 18 B. Mon. 573; Manion *v.* Titsworth, id. 582; Layton *v.* State, 4 Harring. Del. 8; Stevens *v.* Bomar, 9 Humph. 546; Dease *v.* Jones, 23 Missis. 133; Duckett *v.* Crider, 11 B. Mon. 188.

(*a*) The Massachusetts Revised Statutes except from the usual six years' bar a promissory note signed in the presence of attesting witnesses, provided the action be brought by the original payee, or by his executor or administrator. A made a note to his order, indorsed it in blank, and gave it to B, all in the presence of attesting witnesses. B transferred it to C by delivery under the blank indorsement. This note was barred by the statute in six years. Houghton *v.* Mann, 13 Met. 128. But the holder of a witnessed note may bring his action in the name of the administrator of the payee, after the six years, by the administrator's consent. Sigourney *v.* Severy, 4 Cush. 176. And if the payees of an attested note after six years become bankrupt, and the note is sold at auction by the assignee, and bought by one of the payees, without indorsement or writing, he may have his action in the name of both payees for his own benefit, within the statute exception. Drury *v.* Vannevar, 5 Cush. 442. Indeed, it is now held that the holder of a witnessed note may sustain his suit after the six years by merely bringing it in the payee's name. Rockwood *v.* Brown, 1 Gray, 261. Nor is the indorsee barred in his suit, though the indorsement was made more than six years after the maturity of the note. Stanley *v* Kempton, 30 Maine, 118. And it has even been held, that, if an unwitnessed indorsement of partial payment be indorsed on a witnessed note, the statute will not bar the note till twenty years from such payment. Estes *v* Blake, 30 Maine, 164; Howe *v.* Saunders, 38 id. 350; Lincoln Academy *v.* Newhall, id. 179, *Cutting*, J. dissenting. A single witness to a joint note must have attested all the signatures to bring the note into the statute exception. Lapham *v.* Briggs, 27 Vt. 26. An attested memorandum in writing, wherein the maker agrees to pay a note at any time within six years from the date, is not a promissory note within the exception. Young *v.* Weston, 39 Maine, 492. A witnessed note payable in one year in money, or on demand if called for in blacksmith's work, is not within the exception, it being applicable only to a note payable in money. Dennett *v.* Goodwin, 32 id 44. A witnessed note continues saved in the hands of the assignee of an insolvent debtor, or the indorsee or assignee of such assignee. Pitts *v.* Holmes, 10 Cush. 92. See also Smith *v.* Dunham, 8 Pick. 246; Pritchard *v.* Chandler, 2 Curtis, C. C. 488. A promissory note not negotiable is within the Massachusetts statute respecting the limitation of suits on witnessed notes. Sibley *v.* Phelps, 6 Cush. 172.

(*b*) The rule applies to joint debtors, indorsers, or sureties. If a surety on a note, who has been compelled to pay it, or more than his half of it, sue his co-surety for contribu-

it must continue to attach to the same note in the hands of a

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tion, and it appears that a sum exceeding one half the debt was paid, in England, six years before the present suit, he can only recover for what has been paid within six years. Davies *v.* Humphreys, 6 M. & W. 153. But if the principal has paid the residue within six years, the statute runs from this latter date, and not from part payment by the surety. For until the latter date it does not appear that the surety has paid more than his share. Ibid. In all cases where the guarantor or accommodation acceptor, or the like party, may sue for damage sustained by being compelled to pay the principal promisor's debt, the statute runs against his claim only from his actual payment, for then alone his cause of action accrues. Davies *v.* Humphreys, 6 M. & W. 153; Reynolds *v.* Doyle, 1 Man. & G. 753; Collinge *v.* Heywood, 9 A. & E. 633; Butler *v.* Winters, 2 Swan, 91; Knotts *v.* Butler, 10 Rich. Eq. 143. Where one contracts with another, that the latter shall pay the former's debt, and he does so, the statute runs against his claim for reimbursement from his payment only, and not from the contract. If the holder recover judgment of an indorser, who pays a part, the indorser in assumpsit may recover it back of the maker. The statute then does not begin to run until the money is paid, and the indorser may have suit on every such payment. The rule also applies where the parties are prior and subsequent indorsers. Bullock *v.* Campbell, 9 Gill, 182; Barker *v.* Cassidy, 16 Barb. 177; Sims *v.* Goudelock, 6 Rich. 100; Scott *v.* Nichols, 27 Missis. 94; Moore *v.* Caldwell, 8 Rich. Eq. 22; Ponder *v.* Carter, 12 Ired. 242; Deaver *v.* Carter, id. 267; Pope *v.* Bowman, 27 Missis. 194; Garrett *v.* Garrett, 27 Ala. 687. Where A gave two drafts to C, in part payment of his (A's) note, and C promised to indorse these credits on the note, but did not, and indorsed the note over to D, who sued A, and got the whole amount of the note, the statute began against A's claim on C, for repayment, when he was obliged to pay D, and demand for the two drafts need not be made by A upon C. Douglas *v.* Elkins, 8 Foster, 26. If the surety pays the note before maturity, still, as his cause of action does not accrue until then, the statute runs from the latter date, and not before. Tillotson *v.* Rose, 11 Met. 299; Farmers' Bank *v.* Gilson, 6 Barr, 57; Jackson *v.* Adamson, 7 Blackf. 597. Nor, in general, does it run in favor of the guarantor until cause of action accrued on his contract. Cooper *v.* Dedrick, 22 Barb. 516 Nor until default in payment in a continuing guaranty. Bank of South Carolina *v.* Knotts, 10 Rich. Law, 543; Joiner *v.* Perry, 1 Strobh. 76. A joint maker of a note on demand, on paying the amount, may sue the heirs of his co-debtor, by the Mass. Rev. Stat., at any time within one year after such payment, although made after final settlement of the decedent's estate, by the executor or administrator, and after the expiration of the time for bringing suit against the latter. Hayward *v.* Hapgood, 4 Gray, 437. Where the maker of a note gave a mortgage to his surety, conditioned to be void if the maker should pay the note and save the surety harmless from all demands on the note, the statute did not run against the mortgagee until actual payment of the note by him. M'Lean *v.* Ragsdale, 31 Missis. 701. In an action for contribution between joint-obligors, the statute runs from the appropriation of money by the joint obligor. Sherwood *v.* Dunbar, 6 Calif. 53. In Louisiana, the ordinary prescription applicable to the demand of the holder of the note is not applicable to the surety's demand of reimbursement against the principal. The latter is a personal action, barred only by ten years. Linton *v.* Wikoff, 12 La. Ann. 878. In a note on demand, the demand must be made in a reasonable time, or else the indorser is discharged. If the creditor is paid by a note indorsed by the payee and his debtor, the statute does not run from that day, but from the time when the indorsee ought to have made the demand, that is, from the expiration of the "reasonable time." Mudd *v.* Harper, 1 Md. 110. If one joint debtor

transferee.(*c*) The period of limitation begins to run in reference to a promissory note, whether negotiable or not, whenever a cause of action upon the note accrues.(*d*) This cause accrues

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be absent from the State, the statute of limitation is suspended as to him, though his co-debtor remain within the State. Denny *v.* Smith, 18 N. Y. 567, *Denio*, J. dissenting. If one joint promisor be capable of suing when the cause of action accrued, the statute runs against all, both at law and in equity. Jordan *v.* M'Kenzie, 30 Missis. 32; Seay *v.* Bacon, 4 Sneed, 99; Hunt *v.* Ellison, 32 Ala. 173. But if none be so capable, it does not run until the disability is removed from all. Masters *v.* Dunn, 30 Missis. 264; Harlan *v.* Seaton, 18 B. Mon. 312. And so, bringing a suit against one member of a firm has been found to interrupt prescription for all the partners. Speake *v.* Barrett, 13 La. Ann. 479. But it is said the statute may bar one defendant and not another. Pope *v.* Risley, 23 Misso. 185. See Parker *v.* Jackson, 16 Barb. 33. Where an authorized agent draws a bill on his principal, and, on non-acceptance, is obliged to pay himself, upon the agent's claim for damages, the statute runs only from the time when he was called upon to pay. Huntley *v.* Sanderson, 1 Cromp. & M. 467.

(*c*) Scarpellini *v.* Atcheson, 7 Q. B. 864. It may be otherwise with a bill or note payable on demand. Byles on Bills, 272. The statute is a bar to an action on a promissory note brought by the payee against the maker, though the former after six years from maturity paid the amount to the indorsee, and thus became repossessed of the note. Woodruff *v.* Moore, 8 Barb. 171.

(*d*) Dixon *v.* Holdroyd, 7 Ellis & B. 903. In all actions, the statute begins to run from the time the right of action accrues. Emery *v.* Day, 1 Cromp. M. & R. 245, 4 Tyrw. 695; Hardee *v.* Dunn, 13 La. Ann. 161; Crawley *v.* Littlefield, 3 Strobh. 154; Ex parte Storer, Daveis, 294; Richman *v.* Richman, 5 Halst. 114; Young *v.* Mackall, 3 Md. Ch. Dec. 398; Odlin *v.* Greenleaf, 3 N. H. 270; Bennett *v.* Herring, 1 Fla. 387; Gray *v.* Givens, 26 Misso. 291; Atkins *v.* Scarborough, 9 Humph. 517; Davies *v.* Cram, 4 Sandf. 355. The statute of limitations begins to run from any complete legal injury, however slight. But if the act is not legally injurious until certain consequences have appeared, it runs from the appearance of the consequences only. Bank of Hartford Co. *v.* Waterman, 26 Conn. 324. In a breach of warranty of soundness, the statute does not run merely from the time injury befalls the purchaser in consequence of the unsoundness, but from the date of the contract. Baucum *v.* Streater, 5 Jones, 70. If failure of consideration be pleaded to a suit on a note, and a parol warranty of the property for which the note was given, the statute of limitations is no good replication, although the statute period has elapsed since the time of giving that warranty. Morrow *v.* Hanson, 9 Ga. 398.

In case of fraud, it runs from the commission of the fraud, and not from the time the injury results. Wilson *v.* Ivy, 32 Missis. 233; Sublette *v* Tinney, 9 Calif. 423. But where the relation is one of confidence, and the defendant's breach of duty is in not disclosing, the statute runs from the plaintiff's discovery of the breach of duty only. Ibid.; Lott *v.* De Graffenreid, 10 Rich. Eq. 346. If the defendant fraudulently conceal the plaintiff's cause of action, this fact is a good replication to the plea of the statute, though the plaintiff possessed the means of detecting the fraud if attention had been called to it. And the cause of action itself may constitute the fraud, if that be such as to conceal itself. Way *v.* Cutting, 20 N. H. 187; Kane *v.* Cook, 8 Calif. 449; Livermore *v.* Johnson, 27 Missis. 284; Johnson *v.* White, 13 Smedes & M. 584; Brown *v.* Edes, 37 Maine, 318; Rouse *v.* Southard, 39 id. 404; Moore *v.* Greene, 2 Curtis, C. C. 202. Thus, a trustee who purchases at his own sale, and keeps his *cestui que trust* in

when the note falls due; and the time at which it falls due

ignorance of the fact, cannot plead the statute to bar an action for account. West *v.* Sloan, 3 Jones, Eq. 102. But the cases differ a little, apparently, in the degree of watchfulness required of the party whose cause of action has been concealed. Thus, it is said that if the creditor had direct and ample means, in the use of ordinary prudence, to detect the fraud, the replication of fraudulent concealment may not avail him. McKown *v.* Whitmore, 31 Maine, 448; and that if he reply fraudulent concealment against the plea of the statute, he must prove that due diligence was exercised to detect the fraud. McDonald *v.* McGuire, 8 Texas, 361; Buckner *v.* Calcote, 28 Missis. 432. A plaintiff who replies to the plea of the statute, that he had a cause of action which was fraudulently concealed from him by the defendant until too late, must prove all this, and when proved the replication is good. Douglas *v.* Elkins, 8 Foster, 26; Thurston *v.* Lowder, 40 Maine, 197; McDonald *v.* McGuire, 8 Texas, 361. It has been said that an averment by the plaintiff that he was ignorant of the fraud which forms the cause of action, up to a certain time, throws the onus on the defendant of showing his previous knowledge. Thrower *v.* Cureton, 4 Strobh. Eq. 155; Godbold *v.* Lambert, 8 Rich. Eq. 155; Moore *v.* Greene, 2 Curtis, C. C. 202. Where also there is fraud in a transaction of which the plaintiff is kept in ignorance, even without special efforts to conceal it by the defendant, the statute bar runs only from discovery. Mayne *v.* Griswold, 3 Sandf. 463; Miles *v.* Berry, 1 Hill, S. Car. 296; Pennock *v.* Freeman, 1 Watts, 401; Ferris *v.* Henderson, 12 Penn State, 49; Stocks *v.* Van Leonard, 8 Ga. 511; Moffatt *v.* Buchanan, 11 Humph. 369; Sherwood *v.* Sutton, 5 Mason, 143; First Mass. Turnpike Co *v.* Field, 3 Mass. 201; Turnbull *v.* Gadsden, 2 Strobh. Eq. 14; Snoddy *v.* Haskins, 12 Gratt. 363; Sublette *v.* Tinney, 9 Calif. 423; Pendergrast *v.* Foley, 8 Ga 1. Nor does this rule mean that the time when the facts which constitute the fraud are known, but the time when the fraud is discovered. Ferris *v.* Henderson, 12 Penn. State, 49. The transferrer of an usurious promissory note to a *bona fide* holder, for value, is instantly liable to the latter in a suit for repayment of the consideration. But the statute does not run against this right of reclaim until the holder discover the fraud. Persons *v.* Jones, 12 Ga. 371. By parity to the case of fraud, the statute has been held back from running against the right to correct a mistake made in selling land till after its discovery. Grundy *v.* Grundy, 12 B. Mon. 269. But mere ignorance of the right of action, or want of notice, where there is no fraud imputable to the defendant, will not suspend the operation of the statute until discovery. Bank of Hartford Co. *v.* Waterman, 26 Conn. 324; Martin *v.* Branch Bank, 31 Ala 115; Reed *v.* Minell, 30 id. 61; Beck *v.* Searson, 8 Rich. Eq. 130; Bossard *v.* White, 9 id. 483; Howell *v.* Hair, 15 Ala. 194; Tinnen *v.* Mebane, 10 Texas, 246; Steele *v.* Steele, 25 Penn. State, 154; Johnson *v.* White, 13 Smedes & M. 584; Lathrop *v.* Snellbaker, 6 Ohio State, 276; Davis *v.* Cotten, 2 Jones, Eq 430.

We have already said that the statute begins to run, in the case of trusts, from their legal expiration only, or from the trustee's open, known, and adverse possession, after the renunciation of his trust. *Supra*, p. 630, note *m*. After such adverse possession, the statute is no longer in abeyance. Echols *v.* Barrett, 6 Ga. 443; Keaton *v.* Greenwood, 8 id. 97; Turner *v.* Smith, 11 Texas, 620; Scott *v.* Haddock, 11 Ga. 258; Sollee *v.* Croft, 7 Rich. Eq. 34; Perkins *v.* Cartmell, 4 Harring. Del. 270. But you cannot add the adverse possession of one to the adverse possession of another, his transferee, to make out the statute bar. Beadle *v.* Hunter, 3 Strobh. 331. The statute runs from the expiration of the trust White *v.* White, 1 Md Ch. 53; Simms *v.* Smith, 11 Ga. 195. E. g. against a distributee, from the settlement of accounts and the order of distribution. State *v.* Blackwell, 20 Misso. 97. Against a ward, on his arriving at age. Magruder *v.* Good

depends upon the terms of the promise. The limitation begins to

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wyn, 2 Patton & H. 561. Or rather from the settlement of the guardian's accounts in the court of probate. Hagerty *v.* Scott, 10 Texas, 525. In cases of general agency, the same rule applies, to wit, that the statute starts from the expiration of the agency. Hopkins *v.* Hopkins, 4 Strobh. Eq. 207; Parris *v.* Cobb, 5 Rich. Eq. 450; McCoon *v.* Galbraith, 29 Penn. State, 293. But in cases of special agency, where the transactions are isolated, it runs from each item of the account. Ibid. Thus, it runs against attorneys at law when the services contracted for have been performed, or some way determined. Walker *v.* Goodrich, 16 Ill. 341. In general, however, where the employment of an agent has been to collect money for his client, or where a factor holds the proceeds of sales for his principal, the statute does not run against the latter until after having made a demand. Baird *v.* Walker, 12 Barb. 298; Emmons *v.* Hayward, 6 Cush. 501; Halden *v.* Crafts, 4 E. D. Smith, 490; Sneed *v.* Hanly, 1 Hempst. 659; Hyman *v.* Gray, 4 Jones, Law, 155; Merle *v.* Andrews, 4 Texas, 200. But if no demand be made, it would seem that it runs from the expiration of a "reasonable time" for the making of the demand. Lyle *v.* Murray, 4 Sandf. 590; McDonnell *v.* Branch Bank, 20 Ala. 313. So in a contract to pay money on condition, no times being mentioned for payment or performance, the statute runs from the expiration of a reasonable time for payment. Doe *v.* Thompson, 2 Foster, 217; Mitchell *v.* McLemore, 9 Texas, 151.

Defendant gave plaintiff a receipt that he had received $ 150 "on note." The statute did not begin until after the defendant had been requested and had refused thus to apply the money. Sawyer *v.* Tappan, 14 N. H. 352. A owed B, and C, in a settlement between A and C, agreed to pay A's debt, and was credited therewith. B demanded payment of C, and sued him for money had and received to his (B's) use. Held, that there was sufficient privity for the suit, and that the statute did not begin to run till after demand. Carroway *v.* Cox, Busbee, Law, 173. If the agent send notice of money held by him, the statute runs from the notice, it is said. McCoon *v.* Galbraith, 29 Penn. State, 293. If the promise or contract be conditional, the statute does not run till after the happening of the event referred to. Stewart *v.* Marston, 12 La. Ann. 356. Thus, in a promise to pay at the death of a third party, it begins to run at the death. Thompson *v.* Gordon, 3 Strobh. 196. So where land is sold, subject to a reconveyance within a given time if it does not suit, it runs only from the time allowed for rescinding Smith *v.* Fiske, 31 Maine, 512. If the contract contemplates a reasonable time for its performance, the statute runs, as we have said, from the reasonable time. Evans *v.* Hardeman, 15 Texas, 480; Burnley *v.* Sharp, 16 id. 234. But the statute is not suspended by negotiations for a settlement or reference, provided there be no agreement for delay, and the defendant has done nothing to mislead the plaintiff. Gooden *v.* Amoskeag F. Ins. Company, 20 N. H. 73. A suit on a note, brought before it is due, interrupts the statute so long as the suit lasts after the maturity of the note, though dismissed because commenced before maturity. Barrow *v.* Shields, 13 La. Ann. 57; Elliott *v.* Brown, id. 579. And as to the interruption or suspension of the statute by suits, &c., see Destrehan *v.* Fazende, id. 307; Young *v.* Davis, 30 Ala. 213; Hall *v.* Davis, 3 Jones, Eq. 413; Robinson *v.* Robinson, 5 Harring. Del. 8; Allen *v.* Sawtelle, 7 Gray, 165; Curlewis *v.* Lord Mornington, 7 Ellis & B. 283. A replication to the plea of the statute, that the goods for which the action was brought were sold on a year's credit, and that it was a custom of the merchant to indulge his customers with a year's credit, is bad. Brent *v.* Cook, 12 B. Mon. 267. But the statute has been held suspended on a verbal contract, until the time of the credit expires Tisdale *v.* Mitchell, 12 Texas, 68.

run, therefore, not from the date,(*e*) but from the time when the note, being due, may be sued.(*f*) If payable on demand, it runs

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These instances are evidently illustrations of the rule that the statute runs from the time the cause of action accrues; or, as it has been held, from the time some one has a right to demand the thing claimed. Bucklin *v.* Ford, 5 Barb. 393. And in computing time under the statute, the first day is to be excluded, and the last to be included. Steamboat Mary Blane *v.* Beeler, 12 Misso. 477; Smith *v.* Cassity, 9 B. Mon. 192. But see Presbrey *v.* Williams, 15 Mass. 193.

The time to be reckoned is the commencement of the suit, and not the trial. Walker *v.* Clements, 15 Q. B. 1046, 9 Eng. L. & Eq. 332; Moore *v.* Lobbin, 26 Missis. 304; Hope *v.* Alley, 11 Texas, 259. The plaintiff's action begins with the issuing of the writ, and the defendant's with the entry of the plea of set-off; and hence these are the dates for computing the statute. M'Clure *v.* M'Clure, 1 Grant's Cas. 222. In an assignee's action for debt due his insolvent, claims against the insolvent due more than six years before commencing the action, but less than six years before commencing of proceedings in insolvency, may be set off. Parker *v.* Sanborn, 7 Gray, 191. The filing of the petition, in Texas practice, is the commencement of the suit, and stops the statute. Kinney *v.* Lee, 10 Texas, 155. In trover, the time of the actual conversion of the property is the time for beginning to reckon the statute bar. Rogers *v.* Stoever, 24 Penn. State, 186; Clarke *v.* Marriott, 9 Gill, 331; Johnson *v.* White, 13 Smedes & M. 584; Kelsey *v.* Griswold, 6 Barb. 436. Sims *v.* Goudelock, 6 Rich. 100. Notes were delivered to defendant as collateral security for an advance of exchange, 9th March, 1837. On 23d August, 1838, after he had been repaid that advance, he refused, on demand, to deliver up the notes. Held a conversion, and trover must be brought within six years from the time of such conversion. Kelsey *v.* Griswold, 6 Barb. 436. If, in an usurious contract, bonds, mortgages, or other personal property be given as security by the borrower, he may bring trover at once without demand against the lender; and hence by delaying six years from the delivery he is barred. Schroeppel *v.* Corning, 5 Den. 236; Persons *v.* Jones, 12 Ga. 371. The statute runs from conversion without a demand; but if there is no conversion, from the refusal to pay or deliver on demand. McDonnell *v.* Branch Bank, 20 Ala. 313. Where the property is converted once and transferred, each possession is a conversion, and the statute as to each runs from his own conversion. Wells *v.* Ragland, 1 Swan, 501. On an usurious contract, the right to recover back the consideration runs, not from the agreement to pay or lend, but from the actual payment. Rushing *v* Rhodes, 6 Ga. 228.

(*e*) If goods be sold at six months' credit, payment to be made by a bill at two or three months, at the purchaser's option, this is, in effect, a nine months' credit; and, consequently, an action for the price commenced within the statute time, from the end of the nine months, is in season. Helps *v.* Winterbottom, 2 B & Ad. 431, *Parke*, J., *dubitante*, on the ground of the option given. A gave B a writing, acknowledging a certain sum due, concluding: "I have given B an order on C for $ 15, which, when paid, is to be credited on this." An indorsement ran: "Credit fifteen dollars, by C, 1847, April 10. B." The statute ran from the date of the original instrument, and barred the debt. Had it been reckoned only from the date of the credit, it would have failed to fix the bar. Guignard *v.* Parr, 4 Rich. 184. Interest is not barred until the principal is, and hence the various instalments of interest continue good until the statute period after the maturity of the note. Grafton Bank *v.* Doe, 19 Vt. 463.

(*f*) Wittersheim *v.* Carlisle, 1 H. Bl. 631; Renew *v.* Axton, Carth. 3; Webster *v.* Kirk, 17 Q. B. 944; Fryer *v.* Roe, 12 C. B. 437, 22 Eng. L. & Eq. 440. The Alabama statute of *non-claim* does not begin to run in favor of the personal representative of the

from date; (*g*) but if payable on demand, and not delivered until a subsequent period, the day of the delivery is that on which the true making was completed, and from that day the statute runs.(*h*) And there is an exception to this rule in the case of bank-bills (which, in this country, are, generally at least, the only notes which circulate as money among all classes); for the statute of limitations never runs against them, either in the hands of a first holder or a transferee.(*i*)

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indorser of a negotiable note until its maturity, though demand and notice were waived by the maker's indemnifying the indorser without the knowledge of the indorsee. Cockrill *v.* Hobson, 16 Ala. 391. The defendant drew, payable to the plaintiff, three bills on A, who accepted them, being indebted to the plaintiff and defendant, and to a banking company to whom the bills were delivered as security for a debt due them. The bills became due on May 4, 1843, and in 1847 the bank sued the plaintiff on the bills, and signed judgment in December, 1850, and early in 1851 the plaintiff settled that account. The statute was held to bar the plaintiff's recovery afterwards, as payee, from the defendant as drawer of the bills. Webster *v.* Kirk, 17 Q. B. 944, 9 Eng. L. & Eq. 408.

(*g*) It runs from the date, and not from demand, because, as we have elsewhere observed, a demand is not an essential prerequisite to bringing suit upon a note on demand. A note "on demand" is equivalent to a note payable "this day of date." So see Christie *v.* Fonsick, Selw. N. P., 11th ed., 372; Capp *v.* Lancaster, Cro. Eliz. 548; Rumball *v.* Ball, 10 Mod. 38; Megginson *v.* Harper, 2 Cromp. & M. 322; Norton *v.* Ellam, 2 M. & W. 461; Newman *v.* Kettelle, 13 Pick. 418; Wenman *v.* Mohawk Ins. Co., 13 Wend. 267; Larason *v.* Lambert, 7 Halst. 247; Easton *v.* McAllister, 1 Misso. 662; Wilks *v.* Robinson, 3 Rich. 182; Wolfe *v.* Whiteman, 4 Harring. Del. 246; Caldwell *v.* Rodman, 5 Jones, 139; Young *v.* Weston, 39 Maine, 492. A promise in writing to pay a note "at any time within six years from this date," is a promise to pay on demand, and the statute runs from date. Young *v.* Weston, 39 Maine, 492. In an ordinary bank-note on demand, the statute does not run until demand and refusal at the counter of the bank. Mere suspension of the bank is not equivalent to such demand and refusal. Bank of Memphis *v.* White, 2 Sneed, 482. The statute runs from the date of the note, even though it be expressed payable on demand with interest. Norton *v.* Ellam, 2 M. & W. 461. Whether such a note can be said to be overdue, see Brooks *v.* Mitchell, 9 id. 15; Barough *v.* White, 4 B. & C. 325; Gascoyne *v.* Smith, M'Clel. & Y. 338.

(*h*) If deposited with a third party, to be delivered only on a contingency, or at a certain time, the note begins to fall under the statute from delivery to the payee, and not from its date or deposit. Savage *v.* Aldren, 2 Stark. 232. Where the maker and the holder of a note agreed that the note should be held by the maker until his liability as bail for the holder should cease, and that he should then deliver it, the statute did not run from the execution of the contract, but from the time when the liability of the maker as bail ceased. Bowles *v.* Elmore, 7 Gratt. 385. The statute runs from the time a blank acceptance is due as filled up, and not from the time it would have become due if completed in date when it was accepted in blank. Montague *v.* Perkins, C. B. 1853, 22 Eng. L. & Eq. 516.

(*i*) Hill *v.* Tucker, 13 How. 458; Dougherty *v.* Western Bank of Ga., 13 Ga 287;

If a note be payable in instalments, the statute does not run on against the note unless the last instalment falls due, or unless the note contains a promise, that if the first instalment be unpaid the whole note shall be due; in which case it begins to run as soon as the first instalment is unpaid.(*j*)

If a bill is payable at or after sight, the statute begins on presentment; (*k*) if so many days after sight, it begins when they have expired; (*l*) if a bill or note is payable so many days (*m*) after demand, this is the same in its effect as so many days after sight; (*n*) so, if it be payable so many days after notice.(*o*) If payable at a particular place, it does not begin until presentment and demand at that place; (*p*) and in no case until the last day of grace.(*q*) If a bill be dishonored by refusal to accept, and afterwards by non-payment, the statute begins at non-acceptance, because an action might then have been maintained.(*r*)

If a holder of a note die before it is mature, and it becomes mature before administration or probate of a will is granted, the statute does not begin to run (*s*) until then, for there is

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Harsh *v.* Hanauer, 15 Ark 252. Many express statutes have excepted bank-bills, and similar evidences of debt on the part of moneyed corporations, from the operation of the prescriptive period.

(*j*) Hemp *v.* Garland, 4 Q. B 519; Irving *v.* Veitch, 3 M. & W. 90.

(*k*) Holmes *v.* Kerrison, 2 Taunt. 323; Wolfe *v.* Whiteman, 4 Harring. Del. 246.

(*l*) Sutton *v.* Toomer, 7 B. & C. 416, 1 Man. & R. 125; Sturdy *v.* Henderson, 4 B. & Ald. 592; Holmes *v.* Kerrison, 2 Taunt. 323; Dixon *v.* Nuttall, 1 Cromp. M. & R. 307, 6 Car. & P. 320.

(*m*) It is said that if there be no better way of fixing the date of presentment, the first payment of interest indorsed on the note will be presumed to mark the first accrual of interest after presentment. Way *v* Bassett, 5 Hare, 55.

(*n*) Thorpe *v.* Booth, Ryan & M. 388; Wenman *v.* Mohawk Ins. Co., 13 Wend. 267.

(*o*) In the case of a note payable at a given period after notice, notice must be given, and then the additional period must elapse before the statute begins to run. Clayton *v.* Gosling, 5 B. & C. 360; Norton *v.* Ellam, 2 M. & W. 461.

(*p*) Sanderson *v.* Bowes, 14 East, 500; Ex parte Dewdney, 15 Ves. 487; Topham *v.* Braddick, 1 Taunt 572; Collins *v.* Benning, 12 Mod. 444; Piequet *v.* Curtis, 1 Sumner, 478; Bank of Memphis *v.* White, 2 Sneed, 482.

(*q*) Pickard *v.* Valentine, 13 Maine, 412; Kimball *v.* Fuller, 13 La. Ann. 602. But where a note was made on one day, payable the day after, and suit was commenced four years and a day after this second day, the four years' statute of limitations in Texas barred this suit. Smith *v.* Wilson, 15 Texas, 132.

(*r*) Whitehead *v.* Walker, 9 M. & W. 506.

(*s*) Polk *v.* Allen, 19 Misso. 467; Burnet *v.* Bryan, 1 Halst. 377; Hobart *v.* Conn. Turnpike Co., 15 Conn. 145; Branch Bank of Alabama *v.* Windham, 31 Missis. 317:

no party who can sue until such appointment.(*t*) But if it begins to run, it continues to run during the interval.(*u*) But

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Bucklin *v.* Ford, 5 Barb. 393; Conant *v.* Hitt, 12 Vt. 285; Davis *v.* Garr, 2 Seld. 124; Abbott *v.* McElroy, 10 Smedes & M. 100. The statute runs from the last appointment of administrator, where the former is invalid. Brown *v.* Hill, 26 Missis. 643, 27 id. 44. And it runs through the time from the death of one administrator to the appointment of another, and is not intermitted in some States. Pipkin *v.* Hewlett, 17 Ala. 291. See Bancroft *v.* Andrews, 6 Cush. 493. And so Kempton *v.* Swift, 2 Met. 70, where thirty years had elapsed, and administration *de bonis non* was granted, in spite of the statute. The statute is not suspended by the death of one trustee and the failure to appoint another duly, but only by a suit effectually prosecuted. Wooldridge *v.* Planters' Bank, 1 Sneed, 297. In Mississippi, it runs from nine months after the appointment of the administrator. West Feliciana R. R. *v.* Stockett, 13 Smedes & M. 395. In Indiana, the action must be brought within eighteen months of the death. Hiatt *v.* Hough, 11 Ind. 161. Where, at the death of a certain person, his right to recover a legacy was complete, it was not suspended by the delay of his administrator to take out letters. Frost *v.* Frost, 4 Edw. Ch. 733. Since an executor has the right to the testator's personal property at his death, the statute bar then commences to run against him. Arnold *v.* Arnold, 13 Ired. 174. It is not suspended against an action of the legatee to compel the executor to an account, because the legacy was conditional, depending on the liquidation of the estate to ascertain the amount. Deranco *v.* Montgomery, 13 La. Ann. 513. The donee *causa mortis* of a negotiable note not indorsed may, in Massachusetts, sue it in the name of the administrator of donor, at any time within two years after the grant of letters. Bates *v.* Kempton, 7 Gray, 382. Presenting a claim to the administrator, it seems, stops the run of the statute. Beckett *v.* Selover, 7 Calif. 215. It is a good replication that the debt was not barred at the debtor's decease, that no administration was granted, and that the defendant is executor *de son tort*. Brown *v.* Leavitt, 6 Foster, 493; Ferguson *v.* Crowson, 25 Missis. 430. If a party act as executor *de son tort*, the statute runs from the time he so acted; and his subsequently taking out administration does not excuse him. Webster *v.* Webster, 10 Ves. 93. So it has been held that the statute does not begin to run until probate of the will and qualification of the executor. Garland *v.* Milling, 6 Ga. 310.

(*t*) The statute does not run until there are parties to sue and parties to be sued. Johnson *v.* Arnold, 2 Jones, 113; Conwell *v.* Morris, 5 Harring. Del. 299. And hence, where the cause of action does not arise till after a party's death, it does not run until there is somebody to represent him. Ibid. So it is with creditors who must enforce their claims through a personal representative, and are not subjected to the statute until after he is appointed. King *v.* Aughtry, 3 Strobh. Eq. 149. If the payee is dead at the time of acceptance, the statute will not begin to run till administration has been granted. Murray *v.* East India Co., 5 B. & Ald. 204; Burnet *v.* Bryan, 1 Halst. 377.

(*u*) Cases *supra*, note *s*, *ad init.*; Stewart *v.* Spedden, 5 Md. 433; Baker *v.* Baker, 13 B. Mon. 406; Beauchamp *v.* Mudd, 2 Bibb, 537; Baker *v.* Brown, 18 Ill. 91; McClintock's Appeal, 29 Penn. State, 360; Mitcheltree *v.* Veach, 31 id. 455. If the executor does not set up the statute against the creditor's administration summons, neither can the residuary legatees. Briggs *v.* Wilson, Eng. Ch., 39 Eng. L. & Eq. 62. Otherwise as to a *cestui que trust*. Ibid. In general, if a trustee is barred, it has been said, so is the *cestui que trust*. Wooldridge *v.* Planters' Bank, 1 Sneed, 297; Bryan

if the deceased owe a note at his death, it is held by some of our courts that the statute is suspended in favor of the holder of the note, until some party is provided whom he may sue.(*v*) But the general rule certainly is, that, if a statute begins to run against any party, it continues to run,(*w*) and is not interrupted or suspended by any of the disabilities or exemptions mentioned in the statute, although any of them would have prevented it from beginning to run.(*x*)

"Merchants' accounts" are excepted by the statute; and the meaning and purpose of this exception, undoubtedly, was the

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v. Weems, 29 Ala. 423. Perhaps an executor is liable for not setting up the statute when he might, especially against an inequitable claim. Willcox *v*. Smith, 26 Barb. 316. In a suit joining, as it may under the New York code, a debtor and the administrators of a co-debtor on a joint and several note, the latter are to be regarded as if they had been sued separately, and the eighteen months allowed the administrator are to be added to the time for the statute to run before it bars. Parker *v*. Jackson, 16 Barb. 33. Where an action duly commenced by a creditor abates by reason of the defendant's dying intestate, the reasonable time which is allowed for commencing a fresh action against the personal representatives, in order to prevent the statute bar, dates from the grant of the letters of administration. Nor is it affected by the delay of the next of kin in taking out those letters. Curlewis *v*. Mornington, 7 Ellis & B. 283; 2 Wms. Saund. 64 (a).

(*v*) The running is suspended against the estate during the time in which the administrator is not liable thereon. Houpt *v*. Shields, 3 Port. Ala. 247. And if the debtor die within the six years, and by reason of litigation as to the right to probate the six years are out before an executor is appointed, the debt is barred. Rhodes *v*. Smethurst, 4 M. & W. 42. And see the same case affirmed, in error, 6 id. 351. It may be doubted whether equity is always done in the particular instance by the enforcement of this latter rule.

(*w*) If it once begins to run, it continues to run, unless stopped by some express provision of the statute. Nor can any subsequent disability of the plaintiff be replied. Rhodes *v*. Smethurst, 4 M. & W. 42, 6 id. 351; Gray *v*. Mendez, 1 Stra. 556; Duroure *v*. Jones, 4 T. R. 300; Smith *v*. Hill, 1 Wils. 134; Peck *v*. Randall, 1 Johns. 165; Pendergrast *v*. Foley, 8 Ga. 1; Smith *v*. Newby, 13 Misso. 159; Mercer *v*. Selden, 1 How. 37; Den *v*. Richards, 3 Green, N. J. 347; Byrd *v*. Byrd, 28 Missis. 144; Brown *v*. Merrick, 16 Ark. 612; M'Donald *v*. Johns, 4 Yerg. 258; Tyson *v*. Britton, 6 Texas, 222; Chevallier *v*. Durst, id. 239; Cole *v*. Runnells, id. 272; Etter *v*. Finn, 7 Eng. 632; Dillard *v*. Philson, 5 Strobh. 213.

(*x*) The time during which insolvency proceedings are pending against the debtor is not to be excluded in computing the limitation. Collester *v*. Hailey, 6 Gray, 517; Stoddard *v*. Doane, 7 Gray, 387; Reed *v*. Minell, 30 Ala. 61; Harwell *v*. Steel, 17 id. 372. In Louisiana, the bar is suspended as to creditors by a surrender of an insolvent's property; but it is otherwise with successions, whether solvent or insolvent. Succession of Flower, 12 La. Ann. 216. Where an action is founded on a statute liability, it is so far a specialty that the statute of limitations applicable to notes does not apply to this action. Lane *v*. Morris, 8 Ga. 468; Atwood *v*. Agricultural Bank, 1 R. I. 376.

protection of mutual and running accounts.(*y*) Hence, the exception does not extend to accounts settled by promissory notes or bills, nor, properly, to such notes or bills when they are not for the balance of an account, but only for items in it; because

(*y*) They should be open and unsettled accounts between merchant and merchant, and relate to the trade of merchandise. Against such, the statute runs only from the time of the last item. Young *v.* Dobyns, 12 B. Mon. 7; Smith *v.* Dawson, 10 id. 112; Sams *v.* Stockton, 14 id. 232; Fox *v.* Fisk, 6 How. Missis. 328; Ellett *v.* Moore, 6 Tex. 243; Brackenridge *v.* Baltzell, 1 Ind. 333; Deloach *v.* Turner, 6 Rich. 117; Higgs *v.* Warner, 14 Ark. 192; King *v.* King, 1 Stockt. 44; Chambers *v.* Marks, 25 Penn. State, 296. But proof that the plaintiff and defendant were both merchants does not support the replication of the mutual account. McCulloch *v.* Judd, 20 Ala. 703. But if a party sleeps on his demand without entering it on his account until the statute period is passed, he cannot extract it afterwards by entering it on his account. Ex parte Storer, Daveis, 294. An account rendered by a consignee abroad to the assignee of his insolvent consignor, and assented to by his assignee, is an account stated, and not within the exception of merchants' and mutual accounts. Thompson *v.* Fisher, 13 Penn. State, 310. When accounts are "audited, approved, and certified," they become instruments in writing within the statute time, and not mutual accounts. Sannickson *v.* Brown, 5 Calif. 57. The exception applies only to accounts due and payable on the day of sale, and not to articles sold on credit. Effinger *v.* Henderson, 33 Missis. 449. If the parties agree or stipulate to close the account on a certain day future, it runs on the balance from that day. Higgs *v.* Warner, 14 Ark. 192. A particular application of payment to specific items in an account merely recognizes those items, and not a full, open, or unliquidated account, or any balance due thereon. Hodge *v.* Manley, 25 Vt. 210. If the items are all on one side, the account is not mutual, and each item is barred separately. And in such case, the fact that some items are not within the statute provisions does not prevent the statute from barring the rest. Ibid. Todd *v.* Todd, 15 Ala. 743; Wilson *v.* Calvert, 18 id. 274; Bradford *v.* Spyker, 32 id. 134. An account consisting of several items of credit for goods bought, and one of credit for cash paid, is not a mutual account. McCulloch *v.* Judd, 20 Ala. 703. Accounts between copartners have been held not to be mutual accounts within the meaning of the statute. Manchester *v.* Mathewson, 3 R. I. 237; Leavitt *v.* Gooch, 12 Tex. 95. On the other hand, these have been held to be mutual accounts, and consequently to be relieved from the statute bar. Ogden *v.* Astor, 4 Sandf. 311; Bradford *v.* Spyker, 32 Ala. 134. So it is said the statute does not run between partners so long as there are debts due to and from the firm. Hammond *v.* Hammond, 20 Ga. 556. Items of payments and receipts by two tenants in common concerning their joint estate form a mutual account within the statute. Dickinson *v.* Williams, 11 Cush. 258. There must be more than one transaction, to make the account mutual. Marseilles *v.* Kenton, 17 Penn. State, 238. Theobald *v.* Stinson, 38 Maine, 149; Guichard *v.* Superveile, 11 Tex. 522; Judd *v.* Sampson, 13 id. 19; Pridgen *v.* Hill, 12 id. 374; Finney *v.* Brant, 19 Misso. 42; Penn *v.* Watson, 20 id. 13. The accounts may be mutual, within the purview of the State, though none of the items occurred within six years. Bass *v.* Bass, 8 Pick. 187; McLellan *v.* Crofton, 6 Greenl. 308; Dyott *v.* Letcher, 6 J. J. Marsh. 541; Ogden *v.* Astor, 4 Sandf. 311. If the statute has run several years against a current account, its transfer without notice to, or recognition by, a debtor, will not bring it into an account between the debtor and the transferee, but it will be barred from the last item, as if there were no transfer. Green *v.*

such items, being liquidated and settled, come under the general provisions of the statute.

No acknowledgment *alone* (*z*) should be sufficient to take a case from the statute, whether oral or in writing,(*a*) unless it were such and so made as to contain or imply and purport a promise. The cases in which the revival of a debt by acknowledgment is considered are very numerous, and they present the question under a great variety of circumstances. We cite in our notes upon this point, as we have on other points, those cases which seem to establish a rule or to illustrate a principle.(*b*)

Ames, 14 N. Y. 225. So it was where the balance in an account due a firm was assigned to one partner who afterwards had dealings with the debtor. Ibid. Under the English statute, it appears that the exception as to merchants' accounts applies only to actions of account, or on the case for not accounting, and not to debt or assumpsit. Inglis *v.* Haigh, 8 M. & W. 769; Cottam *v.* Partridge, 4 Man. & G. 271, 3 Scott, N. R. 174; Phillips *v.* Cage, 12 Smedes & M. 141. But see Mandeville *v.* Wilson, 5 Cranch. 15.

(*z*) Yet a mere acknowledgment has sometimes been held sufficient. Hollis *v.* Palmer, 2 Bing. N. C. 713; Burton *v.* Wharton, 4 Harring. Del. 296.

(*a*) If the acknowledgment is in the form of, or amounts to, an agreement or promise not to plead the statute of limitations, and is binding, it takes the case out of the statute; but the agreement itself must be within the statute time. Warren *v.* Walker, 23 Maine, 453; Noyes *v.* Hall, 28 Vt. 645. But in some cases it has been held that a naked promise not to plead the statute to a debt already barred is not binding. Stockett *v.* Sasscer, 8 Md. 374. And by some statutes, the promise to waive the statute must be in writing, to support an action for the breach of such alleged promise. Hodgdon *v.* Chase, 32 Maine, 169. An indorsed agreement signed by the defendant not to plead the statute is binding. Burton *v.* Stevens, 24 Vt. 131. See also Rackham *v.* Marriott, 1 H. & N. 234, 37 Eng. L. & Eq. 460, where it is queried by *Pollock*, C. B. whether a promise *simpliciter* of the debtor not to avail himself of the statute is sufficient to take the case out of the statute. In England, and in some States, as we have said, any acts to be construed as acknowledgments must be in writing, and signed by the party sought to be charged. Winchell *v.* Hicks, 18 N. Y. 558; Wadsworth *v.* Thomas, 7 Barb. 445. A verbal promise of the debtor, before the debt was barred, that the statute should make no difference, and that the debtor would pay what was due after squaring accounts, takes the case out of the statute. Cooper *v.* Parker, 25 Vt. 502. In England, Lord Tenterden's act provided that a promise by words only must be in writing, and signed by the party to be charged, in order to remove the statute bar. Haydon *v.* Williams, 7 Bing. 163; Tanner *v.* Smart, 6 B. & C. 603. The act was 9 Geo. IV. ch. 14. Hence, however clear and distinct may be the verbal promise, it cannot revive a barred debt, under this and similar statutes. See Emery *v.* Day, 1 Cromp. M. & R. 245; Van Buren *v.* Webster, 12 Ga. 615; Sloan *v.* Sloan, 6 Eng. 129; Caldwell *v.* Ferrill, 20 Ga. 94; Blackburn *v.* Jackson, 26 Misso. 308; Gillespie *v.* Roseknants, 20 Barb 35; Glen Cove Mut. Ins. Co. *v.* Harrold, id. 298; Esselstyn *v.* Weeks, 2 Kern. 635. The written acknowledgment must contain an actual or inferential promise to pay. Tanner *v.* Smart, *supra*. If it be simply that the note or bill is "just, due, and payable," it is enough. Webber *v.* Cochrane, 4 Texas, 31.

(*b*) In the older cases, an express promise to pay was insisted on. Dickson *v.* Thom

It is certain that a barred debt is not revived by an acknowl-

son, 2 Show. 126. But that rule has long since been relaxed. The best method we can find of stating comprehensively the general view on this point, taken by most of the courts of this country, is this: It is not absolutely necessary that there should be an express promise by the debtor to pay, since an admission, recognition, and acknowledgment of the debt by him may be such that the law will raise an implied promise therefrom to pay it. But in order to produce this effect, the acknowledgment must be clear, explicit, direct, and unqualified, that the debt is due. Ventris *v.* Shaw, 14 N. H. 422; Butterfield *v.* Jacobs, 15 id. 140; Burr *v.* Burr, 26 Penn. State, 284; White *v.* Dow, 23 Vt. 300; Bradley *v.* Field, 3 Wend. 272; Hancock *v.* Bliss, 7 id. 267; Laurence *v* Hopkins, 13 Johns. 288; Walker *v.* Wootten, 18 Ga. 119; Zacharias *v.* Zacharias, 23 Penn. State, 452; Carter *v.* Cross, 7 Gill, 43; Harbold *v.* Kuntz, 16 Penn State, 210; Patterson *v.* Cobb, 4 Fla. 481; Ayers *v.* Richards, 12 Ill. 146; Burton *v.* Wharton, 4 Harring. Del. 296; Russell *v.* Copp, 5 N. H. 154; Fischer *v.* Hess, 9 B. Mon. 614; McCurry *v.* McKesson, 4 Jones, 510; Marshall *v.* Dalliber, 5 Conn. 480; Bailey *v.* Bailey, 14 S. & R. 195; Allison *v.* Pennington, 7 Watts & S. 180; Rogers *v.* Waters, 2 Gill & J. 64; Huff *v.* Richardson, 19 Penn. State, 388; Marseilles *v.* Kenton, 17 id. 238; Bryan *v.* Ware, 20 Ala. 687. The rule is the same in England. There must be a promise to pay; but from a simple acknowledgment the law implies a promise. Hart *v.* Prendergast, 14 M. & W. 741; Wiliams *v.* Griffith, 3 Exch. 335. There must be either an express promise to pay, or an admission of the debt so unambiguous and unquestionable that a promise to pay may be naturally inferred therefrom. Wakeman *v.* Sherman, 5 Seld. 85; Bush *v.* Barnard, 8 Johns. 407; Porter *v* Hill, 4 Greenl. 41; Deshon *v.* Eaton, id. 413; Stockett *v.* Sasscer, 8 Md. 374; Chambers *v.* Garland, 3 Greene, Iowa, 322; Pritchard *v.* Howell, 1 Wis. 131; Ross *v.* Ross, 20 Ala. 105; Deloach *v.* Turner, 6 Rich. 117; Foute *v.* Bacon, 24 Missis. 156; Butler *v.* Winters, 2 Swan, 91; Grant *v.* Ashley, 7 Eng. Ark. 762; Ten Eyck *v.* Wing, 1 Mich. 40; Kensington Bank *v.* Patton, 14 Penn. State, 479; Sherrod *v.* Bennett, 8 Ired. 309; Thornton *v.* Crisp, 14 Smedes & M. 52; Brown *v.* State Bank, 5 Eng. 134; Robbins *v.* Otis, 1 Pick. 368; Bell *v.* Morrison, 1 Pet. 351; Manning *v.* Wheeler, 13 N. H. 486.

Mere silence on the subject, when his attention is called to the debt, is not a recognition of the debt. Tazewell *v.* Whittle, 13 Gratt. 329. The acknowledgment must be voluntary, and admit not only that the debt is due, but that the debtor is willing to pay it. If the words said, or collateral facts, show that the debtor purposed to rely on the statute, the law implies no promise to pay. Bangs *v.* Hall, 2 Pick. 368; Johnson *v.* Evans, 8 Gill, 155; Brainard *v.* Buck, 25 Vt. 573; Deloach *v.* Turner, 6 Rich. 117; Evans *v.* Carey, 29 Ala. 99; Bloodgood *v.* Bruen, 4 Seld. 362; Danforth *v.* Culver, 11 Johns. 146; Ventris *v.* Shaw, 14 N. H. 422; Purdy *v.* Austin, 3 Wend. 187; Bell *v.* Morrison, 1 Pet. 351; Sherman *v.* Wakeman, 11 Barb. 254; Arnold *v.* Downing, id. 554. Hence a recognition of the claim, together with words equivalent to declaring that nothing was due, is insufficient to take the debt out of the statute. Smith *v.* Talbot, 6 Eng. 666. Nor is a promise to pay the principal, if the creditor will consent to lose the interest, by way of compromise, since this shows a willingness to plead the statute, if possible, to the full claim. And so it is in case of any compromise offered. Pool *v.* Relfe, 23 Ala. 701. Nor will any acknowledgment of the principal and refusal to pay the interest take the interest out of the statute. Graham *v.* Keys, 29 Penn. State, 189. The debtor's saying that he was willing to settle and give his note, but that he thought there was not credit enough allowed him, is not a new promise, within the statute. Mills *v.* Taber, 5 Jones, 412. Nor is an offer to pay, apparently

edgment which negatives a promise; as, "I know that it is due,

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arising from a desire to avoid trouble, rather than from a consciousness of owing the debt. See Chambers *v.* Garland, 3 Greene, Iowa, 322. Nor is a proposed reference, to decide whether the debtor shall pay anything. Broddie *v.* Johnson, 1 Sneed, 464. If the maker agree with the holder to pay a certain part of the amount due, in full discharge of the note, and offer a new note for that stipulated amount to the holder, who refuses it, this is no sufficient acknowledgment. Smith *v.* Eastman, 3 Cush. 355. So when the defendant, at a previous trial, said he would not take advantage of the statute, and if the debt was just he would pay it, but contended that the debt was not just, this was not a good acknowledgment. Carruth *v.* Paige, 22 Vt. 179, affirming Phelps *v.* Stewart, 12 id. 256. Nor was a letter sufficient, running: "I am surprised at receiving A's letter for the recovery of your debt. I never shall be able to pay cash, but you may have any of the goods we have at Y." Cawley *v.* Furnell, 12 C. B. 291, 6 Eng. L. & Eq. 397. The same was held, where the defendant, being asked to pay a note as he agreed to do, answered that folks did not always do as they agreed. Douglas *v.* Elkins, 8 Foster, 26. Since the acknowledgment must be voluntary, it must not be given in the capacity of witness. Bloodgood *v.* Bruen, 4 Seld. 362. Nor is any reply so available, if it show a belief that nothing is due. Beck *v.* Beck, 25 Penn. State, 124. Nor must there be any declaration which would exempt the debtor from a moral obligation to pay. Stockett *v.* Sasscer, 8 Md. 374; Mitchell *v.* Sellman, 5 id. 376. The latter case holds, indeed, that if a party admits that his barred note is due, but refuses to pay it on insufficient grounds, e. g. unless he is credited with rents due him from a firm of which the plaintiff is a member, the law raises a promise to pay *in invitum;* otherwise, if he declares himself under no moral obligation to pay. Where the acceptor of a bill had acknowledged his acceptance and former liability, but said he was not liable then because it was out of date, &c., the bill was taken from the statute. Leaper *v.* Tatton, 16 East, 420. But where the acceptor refused to pay, because there was no consideration for his acceptance, the statute barred the debt. Easterly *v.* Pullen, 3 Stark. 186. On the other hand, where the maker of a note said that in the end he thought he should have to pay, this was a sufficient acknowledgment, though he added, "that enough had been paid to pay the debt, if it had been paid when it should have been." Phelps *v.* Williamson, 26 Vt. 230. So, "I supposed the note was paid by A, and if he does not, I shall have to pay it," took the case out of the statute. Hayden *v.* Johnson, id. 768. When the defendant said he had no money, but would call and settle the debt with his creditor, "and did not intend to cut him out of it," it was sufficient. Smith *v.* Leaper, 10 Ired. 86. That case held that a promise was always implied from a good acknowledgment of the debt, until something was shown to rebut the implication. But when A's debt to B was barred, and, on B's requesting a settlement, A assented, and asked if no other notes than his own would do, — B answering, "Yes, if they are good," — these facts made no implied promise. Taylor *v.* Spivey, 11 id. 427. "I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes," was held a good implied promise to pay. Edmonds *v.* Goater, 15 Beav. 415, 9 Eng. L. & Eq. 203. So were the written words, "I shall repeat my assurance of the certainty of your being repaid your generous loan," &c. Collis *v.* Stack, 1 H. & N. 605, 38 Eng. L. & Eq. 487. So where the defendant said, if he owed the plaintiff anything, he was willing to pay him, but claimed that he did not owe him anything. Steele *v.* Towne, 28 Vt. 771. But a letter of the defendant's, saying: "As I do not recollect the date or the amount of the indorsements, I would thank you to send me a statement of them," is not a sufficient recognition of the debt. Gibson *v.* Grosvenor, 4 Gray, 606. *Contra,*

but I will never pay it."(*c*) The true meaning of any acknowl-

in quite similar words, Brown *v.* Keach, 24 Conn. 73. The admission of a party that another holds a note against him is not of itself sufficient to remove the bar; there must be a recognition of the creditor's claim, and that it is justly due. Elliott *v.* Brown, 13 La. Ann. 579. See the cases in note *c*, *infra*.

(*c*) Wainman *v.* Kynman, 1 Exch. 118; Scales *v.* Jacob, 3 Bing. 638; Ayton *v.* Bolt, 4 id. 105; Fearn *v.* Lewis, 6 id. 349; Brigstocke *v.* Smith, 1 Cromp. & M. 483; Spong *v.* Wright, 9 M. & W. 629. So a promise to pay the principal, and a refusal to pay the interest, either on the stated ground that no interest was due, or that payment of the principal ought to be enough, will not take the case out of the statute. Graham *v.* Keys, 29 Penn. State, 189; Duffie *v.* Phillips, 31 Ala. 571; Pearson *v.* Darrington, 32 id. 227; Pool *v.* Relfe, 23 id. 701. And, in general, an offer to pay, or an actual payment, of a part of the claim, as a compromise, and a refusal to pay any more, does not remove the bar as to the balance, nor as to the amount offered and not accepted. Aldrich *v.* Morse, 28 Vt. 642; Bowker *v.* Harris, 30 Vt. 424; Smith *v.* Talbot, 6 Eng. Ark. 666; Smith *v.* Eastman, 3 Cush. 355; Douglas *v.* Elkins, 8 Fost. 26. And see, on the refusal to pay, the cases, *supra*, note *b*, especially Cawley *v.* Furnell, 12 C. B. 291, 6 Eng. L. & Eq. 397; Mitchell *v.* Sellman, 5 Md. 376.

The fact that an insolvent debtor includes a debt in his sworn schedule of debts filed with his petition in insolvency, is not a sufficient recognition. Hidden *v.* Cozzens, 2 R. I. 401; Roscoe *v.* Hale, 7 Gray, 274; Stoddard *v.* Doane, id. 387. The entry of a debt by the debtor in an unsigned schedule of his liabilities will not take it out of the statute. Wellman *v.* Southard, 30 Maine, 425.

A vague admission will not take the case out of the statute, — McBride *v.* Gray, Busbee, 420, — though it is not necessary that the precise words used should be proved. Bulloch *v.* Smith, 15 Ga. 395. So the debtor's expressing to a witness a desire to pay certain barred bills, whenever he should be able, will not take the debt out of the statute. Adams *v.* Torry, 26 Missis. 499. And the mere admission of an indebtedness, without indicating the amount or the nature of the debt, or a promise to pay something, or what is to be paid for, is not sufficient. Shitler *v.* Bremer, 23 Penn. State, 413.

A general acknowledgment of indebtedness, without reference to any particular claim, will not take the case out of the statute. It must specify, or plainly refer to, the cause of action or demand sought to be recovered, — to the instrument on which it is founded, or to other positive marks of identification. Arey *v.* Stephenson, 11 Ired. 86; Martin *v.* Broach, 6 Ga. 21; Brewer *v.* Brewer, id. 587; Brailsford *v.* James, 3 Strobh. 171; Shaw *v.* Allen, Busbee, 58; McRae *v.* Leary, 1 Jones, 91; Huff *v.* Richardson, 19 Penn. State, 388; Suter *v.* Sheeler, 22 id. 308; Clarke *v.* Dutcher, 9 Cowen, 674; Dinsmore *v.* Dinsmore, 21 Maine, 433; Bell *v.* Morrison, 1 Pet. 351; Buckingham *v.* Smith, 23 Conn. 453; Shitler *v.* Bremer, 23 Penn. State, 413; Burr *v.* Burr, 26 id. 284; Arnold *v.* Downing, 11 Barb. 554.

Hence, it has been held that an admission of an indefinite sum being due is not enough. McBride *v* Gray, Busbee, 420. Nor is a promise to pay such a sum as the plaintiff might deem just on presenting his account. Long *v.* Jameson, 1 Jones, 476. Nor was a promise of the debtor to "call and settle," where there were several accounts presented to him, and only their gross amount was mentioned to him, without specifying the claim on each. Loftin *v.* Aldridge, 3 id. 328.

In Mississippi, the statute provides for a "presentation of the very claim," with actual reference to it, and admission of it. Lawrence *v.* Mangum, 30 Miss. 171; Shackleford *v.* Douglass, 31 id. 95. But it is sufficient, if there be a mutual and perfect

edgment is said to be a question for the jury; (*d*) but if it

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understanding as to the identity of the claim meant, and the creditor stands ready to produce it, if required. Brody *v.* Doherty, 30 id. 40. The latter case holds that a mere acknowledgment is sufficient if the debt is not barred, and not sufficient if it is barred.

If the payment be merely on account, and the account be an unsettled mutual one, the payment must refer to a fixed sum, or to a balance easily and certainly ascertainable. Huff *v.* Richardson, 19 Penn. 388; Boxley *v.* Gayle, 19 Ala. 151. An admission must be of a sum certain or of one which may be, and afterwards is, reduced to a certainty. Moore *v.* Hyman, 13 Ired. 272; McRae *v.* Leary, 1 Jones, Law, 91. And a promise to pay a debt not yet barred, and payable in money only, with good notes or judgments, is no replication to the plea of the statute. Taylor *v.* Stedman, 13 Ired. 97.

An admission that a small but indefinite sum is due, is not sufficient. Mask *v.* Philler, 32 Missis. 237. But in some cases it is held that, if the acknowledgment is good in other respects, the precise amount of the debt need not have been stated. Lechmere *v.* Fletcher, 1 Cromp. & M. 623; Bird *v.* Gammon, 3 Bing. N. C. 883. Whitney *v.* Bigelow, 4 Pick. 110; Davis *v.* Steiner, 14 Penn. State, 275; Lord *v.* Harvey, 3 Conn. 370; Hazlebaker *v.* Reeves, 12 Penn. State, 264.

In England, a promise to "pay the balance" due on a bill is good, though the amount be not expressed; but if the evidence adduced leaves the balance uncertain, the plaintiff has only nominal damages. Dickenson *v.* Hatfield, 5 Car. & P. 46; Dabbs *v.* Humphries, 10 Bing. 446; Kennett *v.* Millbank, 8 id. 38. A general admission of debt on account, with a promise to pay, justifies recovery for only a nominal sum. Kittridge *v.* Brown, 9 N. H. 377. It is said that an obligor on a bond must acknowledge the debt when barred, with a full knowledge of his legal rights. Tillett *v.* Commonwealth, 9 B. Mon. 438.

A conditional admission or promise is null, unless acceded to by the creditor. If acceded to, it becomes absolute, and available to take the note out of the statute as soon as the event happens or the condition is performed; and not until then. Wakeman *v.* Sherman, 5 Seld. 85; Didier *v.* Davison, 2 Sandf. Ch. 61; Tompkins *v.* Brown, 1 Denio, 247; Shaw *v.* Newell, 1 R. I. 488; Kampshall *v.* Goodman, 6 McLean, 189; Farmers' Bank *v.* Clarke, 4 Leigh, 603; Mitchell *v.* Clay, 8 Texas, 443; Bulloch *v.* Smith, 15 Ga. 395. A's debt was barred by the statute, but he said it was just, and promised to pay it, if he could not prove that B had paid it. This was held a good acknowledgment, and the *onus* was on A to show that B had paid it. Richmond *v.* Fagua, 13 Ired. 445. The debtor's promise that, if he is allowed a little time, he will pay all his debts, when the creditor forbears two years, is sufficient. Guy *v.* Tams, 6 Gill, 82.

If the debtor's promise be to pay as soon as he could a barred note, present ability at the time of suit must be shown by the plaintiff, and when proved the promise is absolute. Tanner *v.* Smart, 6 B. & C. 603; Edmunds *v.* Downes, 2 Cromp. & M. 459; Lang *v.* Mackenzie, 4 Car. & P. 463; Linsell *v.* Bonsor, 2 Bing. N. C. 241; Humphreys *v.* Jones, 14 M. & W. 1; Howentt *v.* Bonser, 3 Exch. 399; Sherman *v.* Wakeman, 11 Barb. 254. Where his promise was to pay "that fall or winter, as soon as he could," the conditional promise became absolute at the end of winter, and revived the debt. Watkins *v.* Stevens, 4 Barb. 168. But the promise to pay "as soon as he could" has been held too indefinite for a conditional promise, and therefore to be considered an absolute promise. Butterfield *v.* Jacobs, 15 N. H. 140; First Congregational Soc. in Lyme *v.* Miller, 15 id. 520. The promise "if he had not paid, he would," becomes absolute on proof of the non-payment. Hill *v.* Kendall, 25 Vt 528.

(*d*) It is for the jury, and not the court, to say, in a doubtful case, to what debts cer-

be in writing, the law of construction would give it to the court.(*e*)

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tain general words of promise and acknowledgment apply, and what the meaning of the terms used is. Wainman *v.* Kynman, 1 Exch. 118; Shaw *v.* Newell, 2 R. I. 264, Guy *v.* Tams, 6 Gill, 82; Dorr *v.* Swartwout, 1 Blatch. C. C. 179 In the last case but one it was held, that, if the plaintiff shows but a single indebtedness, the general recognition may apply to that. And then, if the debtor alleges that a different debt exists, the *onus* of proving this rests on him. In Mitchell *v.* Clay, 8 Texas, 443, it was said that a general acknowledgment will apply to the particular debt sued on, unless the defendant show another debt due from him to the plaintiff; and that, subject to this qualification, the application of the promise is for the jury. Finally, a recent English case decided that where there were two debts barred, and one not, it was for the jury to say whether a part payment made without appropriation by the debtor was made generally, on whatever might be due, or on a particular account Per *Erle* and *Crompton*, JJ. in Walker *v.* Butler, 6 Ellis & B. 506, 37 Eng. L. & Eq. 13.

Under the former rules, at all events, the order of appropriation of payments is rather a matter of law than of fact, except where it is doubtful, as above, whether the debtor did attempt to make a choice. Hence, if some of a series of promissory notes are barred and some not, and a general part-payment is made thereon without any direction or act from which the debtor's disposition can be implied, perhaps it is best to say that the creditor cannot apply the funds to the barred debts, and thus revive them, because the debtor's positive consent is essential to such an appropriation. Waters *v.* Tompkins, 2 Cromp. M. & R. 723; Nash *v.* Hodgson, 6 DeG. M. & G. 474, 31 Eng. L. & Eq. 555; Burn *v.* Boulton, 2 C. B. 476; Cleve *v.* Jones, 6 Exch. 573, 4 Eng. L. & Eq. 514, overruling Willis *v.* Newham, 3 Younge & J. 518; Philpott *v.* Jones, 2 A. & E. 41; Wood *v.* Wylds, 6 Eng. Ark. 754; Pond *v.* Williams, 1 Gray, 630. But the debtor may, of course, signify his assent to waiving the statute; and accordingly many cases have held that, in the silence of the debtor, the unappropriated money may be passed to the revival of the barred debts. Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Waller *v.* Lacy, 1 Scott, 186, 1 Man. & G. 54; Livermore *v.* Rand, 6 Foster, 85; Watt *v.* Hock, 25 Penn. State, 411; Treadwell *v.* Moore, 34 Maine, 112. This view might rest, we presume, upon two grounds: — 1. That the creditor has the second choice, in the law of appropriation of payments. 2. That the law itself, in the lack of other guide, favors the payment of the earlier debt. But it may be queried whether that other principle, sometimes insisted on in the law of appropriations, — at least, where the civil law is respected, — to wit, that the creditor should apply the payment to the debtor's best interests, ought not to govern some of the cases. The jury may infer a waiver of the statute from the character of a mutual adjustment of accounts before the money is sent. Ashby *v.* James, 11 M. & W. 542; Pott *v.* Clegg, 16 id. 321; Worthington *v.* Grimsditch, 7 Q. B. 479; Clark *v.* Alexander, 8 Scott, N. R. 147. But words of denial prevent the barred debt from being taken from the statute. Wainman *v.* Kynman, 1 Exch. 118. In Vermont, it has been held, that, while a creditor may apply a general payment to any one of several accounts, if they are all barred, and revive the balance of that particular account, he cannot distribute the funds upon all his barred notes, so as to revive all. Ayer *v.* Hawkins, 19 Vt. 26. If part of the account be barred, a general promise to pay is not sufficient, since it may refer to that part unaffected by the statute. Morgan *v.* Walton, 4 Barr, 321. See *infra*, p. 655, note *h*.

(*e*) Morrell *v.* Frith, 3 M & W. 402. We may here remark, that the new promise or acknowledgment is held merely to revive the original promise and debt, and does not

The payment which suffices to take a case out of the statute must import a promise to pay the balance, and, therefore, it must be a payment of a part, and not a payment regarded or asserted by the debtor to be a payment of the whole.(*f*) This

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create a new one. It gives a new cause of action on the old promise, and the replication must therefore be consistent with the declaration. Hollis *v.* Palmer, 2 Bing. N. C. 713; Austin *v.* Bostwick, 9 Conn. 496; Ellicott *v.* Nichols, 7 Gill, 85; Newlin *v.* Duncan, 1 Harring. Del. 204; Philips *v.* Peters, 21 Barb. 351; Winchell *v.* Bowman, id. 448. Hence, where the law implies a new promise from a clear acknowledgment, it is not the acknowledgment, but the implied promise, that revives the one mentioned in the declaration. Ellicott *v.* Nichols, 7 Gill, 85. For this new promise, the barred debt, or, as is sometimes said, the moral obligation, is a good consideration. Watkins *v.* Stevens, 4 Barb. 168. Thus it is said, that, "under the terms of the contract as controlled by the existing law, the debt is paid by the failure of the creditor to sue, within the time agreed upon. But the original debt, being a good moral consideration, is sufficient to support a new contract. Fairbanks *v.* Dawson, 9 Calif. 89. The action, therefore, must be on the original contract, or original instrument, and not on the part payment or the new promise, whether oral or written; but this latter should appear in the replication. Clark *v.* Atkinson, 2 E. D. Smith, 112; Biscoe *v.* Stone, 6 Eng. 39; Shackleford *v.* Douglass, 31 Missis. 95. The contrary has sometimes been implied, but wrongly. Kampshall *v.* Goodman, 6 McLean, 189. From the nature of the contract, assumpsit has been considered the only proper form of action in which the replication of a new promise will stand. Even an express promise to pay has been held incompetent to take a case out of the statute, when the action was one of debt. The form should have been assumpsit. A'Court *v.* Cross, 3 Bing. 329; Rice *v.* Wilder, 4 N. H. 336; Bank *v.* Sullivan, 6 id. 133; Downer *v.* Shaw, 8 Foster, 151; Brannock *v.* Bushinell, 4 Jones, 33. So the new promise is not a good replication in tort. Goodwyn *v.* Goodwyn, 16 Ga. 114. Even if the new promise be conditional, and thus differ from the old one, it is not necessary to declare upon the new one, but the promise may be declared on as absolute. Irving *v* Veitch, 3 M. & W. 90; Edmunds *v.* Downes, 2 Cromp. & M. 459; Gardner *v.* M'Mahon, 3 Q. B. 561; Haydon *v.* Williams, 7 Bing. 163.

(*f*) See, per *Parke*, B., in Worthington *v.* Grimsditch, 7 Q. B. 479; Gowan *v.* Forster, 3 B. & Ad. 507; Burn *v.* Boulton, 2 C. B. 476; Tippets *v.* Heane, 1 Cromp. M. & R. 252; Howe *v.* Saunders, 38 Maine, 350; Bowman *v.* Downer, 28 Vt. 532; Arnold *v.* Downing, 11 Barb. 554. Yet it has been held that the part payment of an authorized agent will revive the debt, though not made with any such purpose or intention, the object and effect of the payment being merely questions of legal construction. Barger *v.* Durvin, 22 Barb. 68. See *infra*, p 661, note *b*. But if accompanied with circumstances inconsistent with the promise to pay the barred debt, the claim is not revived. Jewett *v.* Petit, 4 Mich. 508. In Mississippi, it appears that even a part payment is not sufficient, unless accompanied with an express admission of further debt, or an express promise to pay. McCullough *v.* Henderson, 24 Missis. 92; Anderson *v.* Robertson, id. 389. Nor is the indorsement of a credit upon a promissory note, although signed by a defendant, such an acknowledgment of the balance due as to take it out of the statute. Davidson *v.* Harrisson, 33 id. 41. An indefinite promise of the debtor to "attend to the debt," or to "settle it," or "fix it," or to "satisfy," is not usually considered sufficient to take the debt from the statute. Bell *v.* Crawford, 8 Gratt. 110; Moore *v.* Hyman, 13 Ired. 272; Emerson *v.* Miller, 27 Penn. State, 278; Zacharias *v* Zacharias, 23 id. 452; Kyle *v.* Wells, 17 id. 286; Pearson *v.* Darrington, 32 Ala. 227

payment may be made, in this country at least, by a note or bill; and, then, not only the note is enforcible, but it revives the rest of the debt.(*g*)

If there be many debts, and money is paid by the debtor without appropriation, and some of the debts are barred by the statute, and others not, the creditor may appropriate the payment to those which are barred so as to leave him at liberty to prosecute the others; but he cannot, by his own appropriation of the payment as a part of a barred debt, revive it for the balance.(*h*) If, however, the debtor so appropriates the payment

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An acknowledgment of the justice of the claim, and a promise "to settle," may be enough. Brody *v.* Doherty, 30 Missis. 40.

(*g*) Ilsley *v.* Jewett, 2 Met. 168. See Gowan *v.* Forster, 3 B. & Ad. 507; Irving *v.* Veitch, 3 M. & W. 90. Goods may be also taken by agreement in part payment, and will bar the statute. Hart *v.* Nash, 2 Cromp. M. & R. 337; Hooper *v.* Stephens, 4 A. & E. 71, 7 Car. & P. 260; Sibley *v.* Lumbert, 30 Maine, 253. And the part payments may be proved by the former owner of the note, to whom the chattels were delivered, in part payment. Sibley *v.* Lumbert, *supra*. A written agreement by the maker of a promissory note to deliver, in consideration of indulgence on the note, a portion of his crops to the agent of the payee in discharge of his debt, will take the case out of the statute. Randon *v.* Toby, 11 How. 493. If a bill of exchange is delivered by the debtor to the creditor in part payment, under such circumstances as imply a promise to pay the remainder, it is sufficient to take the case out of the statute, whether the bill be subsequently honored or not. Turney *v.* Dodwell, 3 Ellis & B. 136, 24 Eng. L. & Eq. 92. A part payment must be alleged with substantial precision and certainty, so as to be deemed to be admitted by the defendant. Brown *v.* Wakefield, 1 Gray, 450; Moore *v.* Hyman, 13 Ired. 272. Letters of an indorser to the holder of a barred note, which bear date more than six years before suit, are not admissible to take the note from the statute. Hoadley *v.* Bliss, 9 Ga. 303. A part payment before the time limited for a contract has expired will not remove the statute bar which afterwards attaches. Fairbanks *v.* Dawson, 9 Calif. 89. See further, as to the effect of part payments of notes, Trumball *v.* Tilton, 1 Foster, 128; Palmer *v.* Andrews, 1 McAll. C. C. 491; Winchell *v.* Hicks, 18 N. Y. 558; Smith *v.* Simms, 9 Ga. 418; Strawn *v.* Hook, 25 Penn. State, 391. In Georgia, under the act of 1854, part payment of a note, with an express admission of the debt, is not sufficient, unless the latter is in writing. Holland *v.* Chaffin, 22 Ga. 343. In all cases, part payment, like any other recognition, must be made upon the particular debt in suit. Carlisle *v.* Morris, 8 Ind. 421. And the statute, of course, begins to run again from the recognition by payment or promise. Tillinghast *v.* Nourse, 14 Ga. 641; Rich *v.* Dupree, id. 661. If the defendant admitted there was a balance against him, and made a part payment on that balance, it is sufficient, though no precise sum is agreed on as the true balance before the payment. Walker *v.* Butler, 6 Ellis & B. 506, 37 Eng. L. & Eq. 13.

(*h*) See *supra*, p. 653, note *d*. Where there are several claims, the plaintiff must prove an appropriation of the part payment to the particular debt sued on. Armistead *v.* Brooke, 18 Ark. 521. Of three promissory notes two were barred. Payment was made of a less sum than the amount of the note which was not barred. It was held that the payment prevented the statute from running against this latter note. Nash *v.* Hodgson, 6 DeG. M. & G. 474, 31 Eng. L. & Eq. 555. The principle, according to

it will have this effect; and parol evidence of this appropriation by him is admissible.(*i*)

Payment of interest revives a debt for the principal; (*j*) but payment of the whole principal does not revive a debt for the interest. For if one pays interest, this imports that he thinks the principal due; but if one pays the principal only, and either neglects or refuses to pay interest, this can be explained only by the supposition that he considered the principal to be due without interest.(*k*)

A promise by words (*l*) of one joint debtor does not, under

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the latter case, is, that the payment of a smaller sum on an account of a larger sum protects all the debts not then barred. But it does not revive a barred debt, if it can be appropriated to any sum not barred.

(*i*) See *supra*, note *h*, and p. 653, note *d*.

(*j*) Purdon *v.* Purdon, 10 M. & W. 562; Evans *v.* Davies, 4 A. & E. 840; Clark *v.* Hooper, 10 Bing. 480; Megginson *v.* Harper, 2 Cromp. & M. 322; Hollis *v* Palmer, 2 Bing. N. C. 713; Sanford *v.* Hayes, 19 Conn. 591. See also Craig *v.* Calloway Co. Ct., 12 Misso. 94; Lane *v.* Doty, 4 Barb. 530; Trustees, &c in Fryeburg *v* Osgood, 21 Maine, 176. Payment of interest, in a case where the maintenance of a child was treated by the parties as a money payment equivalent to the interest, revived the principal. Bodger *v.* Arch, 10 Exch. 333, 28 Eng. L. & Eq. 464. And a payment of interest on a note on demand takes the note out of the statute, though no previous demand have been made. Bamfield *v.* Tupper, 7 Exch. 27. But the indorsement of a payment of interest on a note, made by the authority of a deceased holder, is not sufficient, if it appear to have been made after the note was barred. Briggs *v.* Wilson, 17 Beav. 330, and more fully in 39 Eng. L. & Eq. 62. It seems, that if the interest is paid in advance, and if the note is any time within the statute period after the last time up to which the interest is paid, the suit is good. First Congregational Society in Lyme *v.* Miller, 15 N. H. 520.

(*k*) Collyer *v* Willock, 4 Bing. 313; Bealey *v.* Greenslade, 2 Cromp. & J. 61; Graham *v.* Keys, 29 Penn. State, 189; Pool *v.* Relfe, 23 Ala. 701; Pearson *v.* Darrington, 32 id. 227; Duffie *v.* Phillips, 31 id. 571. *Supra*, p. 651, note *c*.

(*l*) Before the 9 Geo IV. ch. 14, the verbal acknowledgment of a promisor, in England, that the debt was payable, was sufficient to take it from the statute, not only as against him, but as against all or any one of the co-promisors, in a separate action against him. Whitcomb *v.* Whiting, 2 Doug. 652. And this was true, though the co-promisor was only a surety. Perham *v.* Raynal, 2 Bing. 306; Nicholls *v.* Dowding, 1 Stark. 81; Rex *v.* Inh. of Hardwick, 11 East, 578. So see the cases cited in other notes, decided before the year 1829. In this country, in many cases, the admission or recognition of one joint debtor or co-maker of a promissory note takes the note or debt out of the statute as against each and all of the other promisors. White *v.* Hale, 3 Pick. 291; Frye *v.* Barker, 4 id. 382; Getchell *v.* Heald, 7 Greenl. 26; Shepley *v.* Waterhouse, 22 Maine, 497; Winchell *v.* Bowman, 21 Barb. 448; Clark *v.* Sigourney, 17 Conn. 511. See *infra*, note *m*. But the acknowledgment of one joint maker, so as to affect the other, must be clear and explicit, and if this be payment, it must be made on account of the note. Holme *v.* Green, 1 Stark. 488. And see Davies *v.* Edwards, 7 Exch. 22; Brandram *v.* Wharton, 1 B & Ald. 463; Ex parte Woodward, 3 Mont & Ayr. 609.

the statute, revive the debt as to the others.(*m*) The rule used to be, and, without the statute, must be now, that the promise of a partner of an existing firm revived the debt of the whole firm, because he had the right to bind them; (*n*) but not the promise of one who had been a partner of a firm which was dissolved, because the dissolution terminated this right.(*o*) It seems, how-

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(*m*) Emery *v.* Day, 1 Cromp. M. & R. 245. So it is with the acknowledgment of one of the makers of a joint and several note. Grant *v.* Ashley, 7 Eng. Ark. 762; Wooddy *v.* State Bank, id. 780; Goudy *v.* Gillam, 6 Rich. 28; Watts *v.* Devor, 1 Grant's Cas. 267; Barger *v.* Durvin, 22 Barb. 68. If sureties, being called upon by the holder of their note for payment, refer to the principal, and the latter, informed of the reference, makes a payment, this takes the bar of the statute from them also. But it would not affect such sureties as took no part in the reference. Winchell *v.* Hicks, 18 N. Y. 558. By the Vermont Rev. Stat. of 1839, one joint contractor no longer can take his associates out of the statute. Carlton *v.* Ludlow Woollen Mill, 27 Vt. 496. A promise by an individual member of a college corporation will not bind the college. Lyman *v.* Norwich University, 28 id. 560. One of two joint makers of a joint and several note cannot revive the barred note as against the other maker, so that the holder may recover of the latter as survivor, after the death of the former. Bogert *v.* Vermilya, 10 Barb. 32. Where the statute is pleaded to a suit against husband and wife for her debt *dum sola*, if a new promise is replied, it must be proved binding upon both, or the issue is not sustained. Moore *v.* Leseur, 18 Ala. 606. And a promise of the wife, who has been married six years before the suit, is no new promise against the husband, without his privity. Neve *v.* Hollands, 18 Q. B. 262, 12 Eng. L. & Eq. 398. See Pittam *v.* Foster, 1 B. & C. 248. It has been said, that, in a joint and several contract, the admission of one contractor binds the others, if made whilst the contract is still unbarred. But not so in the case of a several contract, unless the promise be authorized by the others. Bowdre *v.* Hampton, 6 Rich. 208; Tillinghast *v.* Nourse, 14 Ga. 641. In Mississippi, the English rule, that the party actually promising is the only one bound, seems to be followed. Fonte *v.* Bacon, 24 Missis. 156. It seems, in England, that this rule is always followed, unless in case of a continuing joint contract. Fordham *v.* Wallis, 10 Hare, 217, 17 Eng. L. & Eq. 182.

(*n*) So see White *v.* Hale, 3 Pick. 291; Frye *v.* Barker, 4 id. 382; Clark *v.* Sigourney, 17 Conn. 511. But for the more recent statute rules, following the 9 Geo. IV. ch. 14, see note *m*, and other notes *supra*. It has been suggested that the written acknowledgment of one member of the firm is no more effectual than an acknowledgment by one of several ordinary joint contractors. Clark *v.* Alexander, 8 Scott, N. R. 147. The promise of one partner to pay the firm's outlawed debt is not good against the other partners. True *v.* Andrews, 35 Maine, 183; Fortune *v.* Hayes, 5 Rich. Eq. 112.

(*o*) Wood *v.* Braddick, 1 Taunt. 104; Bell *v.* Morrison, 1 Pet. 351; Van Keuren *v.* Parmelee, 2 Comst. 523; Ellicott *v.* Nichols, 7 Gill, 85. Neither surviving partner, nor the executor of a deceased partner, can revive a partnership debt against the deceased partner's estate. Bloodgood *v.* Bruen, 4 Seld. 362. A and B, copartners, gave a joint note, as individuals, for a partnership debt. A sold all his interest, with liabilities attached, in the firm, to C. B then notified C that the note was justly due, and C consented that it should be paid; and A collected assets of the firm enough to pay its debts, and also the note. This was held no acknowledgment. It might have been otherwise, had the note been a partnership note. Wellman *v.* Southard, 30 Maine,

ever, that an actual payment by one of two or more joint debtors is now considered as reviving the debt for all, even, on some authorities, if made fraudulently,(*p*) on the ground that each joint debtor is the agent of all the rest for making a payment which all are bound to make.(*q*) But, on the reason of the

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425. Part payment by an agent, even though one of the partners, is not within the Vermont exception relating to joint contractors. Carlton *v.* Ludlow Woollen Mill, 28 Vt. 504. Compare Clark *v.* Alexander, 8 Scott, N. R. 147. It seems to have been considered, in some earlier cases, that a partner might revive a firm's note after the dissolution. Wheelock *v.* Doolittle, 18 Vt. 440; Patterson *v.* Choate, 7 Wend. 441. Or that, at all events, he might by a part payment thereon. Goddard *v.* Ingram, 3 Q. B. 839; Wood *v.* Braddick, 1 Taunt. 104. Part payment by a partner after the dissolution of the firm prevents the bar of the statute from attaching, provided the creditor had no notice of the dissolution. Tappan *v.* Kimball, 10 Fost. 136. Sometimes it is held that a partner's new promise after the dissolution of the firm will be good against all, if the debt is barred, but otherwise, if not barred. Walton *v.* Robinson, 5 Ired. 341; Brewster *v.* Hardeman, Dudley, 138. *Supra*, note *n*.

(*p*) Goddard *v.* Ingram, 3 Q. B. 839.

(*q*) Whitcomb *v.* Whiting, 2 Doug. 652; Perham *v.* Raynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & C. 36; Ellicott *v.* Nichols, 7 Gill, 85; Cox *v.* Bailey, 9 Ga. 467; Davis *v.* Coleman, 7 Ired. 424; Joslyn *v.* Smith, 13 Vt. 353. So it is, though the co-promisor was surety only. Caldwell *v.* Sigourney, 19 Conn. 37. The ground is, that the part payment of one is necessarily a payment for the benefit of all. Turner *v.* Ross, 1 R. I. 88. And hence the doctrine has been held even in case of payment made by a partner after dissolution of the firm. Wood *v.* Braddick, 1 Taunt. 104; Goddard *v.* Ingram, 3 Q. B. 839. On the other hand, it has been repeatedly held that the acknowledgment by one co-promisor of having made a part payment, binds him alone. Balcom *v.* Richards, 6 Cush. 360; Hathaway *v.* Haskell, 9 Pick. 42. But a distinction between notes barred and notes unbarred is often made on this point. And it is held, in some cases, that a part payment of principal or interest made *bona fide* by one joint maker, before the note is barred, will bind the others. Carll *v.* Hart, 15 Barb. 565; Winchell *v.* Bowman, 21 id. 448; Lane *v.* Doty, 4 id. 530; Biscoe *v.* Jenkins, 5 Eng. Ark. 108; Hicks *v.* Lusk, 19 Ark. 692; Craig *v.* Callaway Co. Ct., 12 Misso. 94; Disborough *v.* Bidleman, Spencer, 275. But otherwise if the note is already barred. Biscoe *v.* Jenkins, 5 Eng. Ark. 108; Biscoe *v.* James, id. 163. Other cases, as we have said, hold that, whether the debt is barred or not at the time of the part payment, this act of one maker of the joint and several note binds only himself. Balcom *v.* Richards, 6 Cush. 360; Bogert *v.* Vermilya, 10 Barb. 32; Shoemaker *v.* Benedict, 1 Kern. 176. Part payment made by one of several joint debtors, not partners at the time, does not affect the others. Coleman *v.* Fobes, 22 Penn. State, 156. But when two joint promisors on a note, applied to for payment of interest, refer to a third, who pays it, this reference, by implied assent, takes the case out of the statute. Winchell *v.* Bowman, 21 Barb. 448. So, if a payment is made by the surety in the presence of the principal, who knew it, but said nothing, this action implies the principal's consent. Whipple *v.* Stevens, 2 Foster, 219. But the same case holds that a payment of one, in the absence of his co-promisor, is not sufficient to bind the other. Ibid. *Contra*, as to co-obligors of a bond, in Lowe *v.* Sowell, 3 Jones, 67. Under the former statute of Maine, part payment by one of two joint makers was the payment of both. Patch *v.* King, 29 Maine, 448; Colburn *v.* Averill, 30 id. 310. But now

thing, we should say that there was no more authority to revive the debt by payment than by promise.(*r*) This payment or promise may be made while the statute is running, or after it has run out and the note is barred.(*s*) But if one of the joint makers be dead, the payment by another does not revive the note against the executors of the deceased; (*t*) nor does a payment by them revive it against the survivor.(*u*) Nor can the promise of an executor revive a debt, unless it be express and specific; (*v*) nor a payment by him, unless made in his repre-

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such a payment, even in the presence of the other promisors, is no evidence of a new promise on his part. Quimby *v.* Putnam, 28 Maine, 419; Wellman *v.* Southard, 30 id. 425.

(*r*) Under the statute of 9 Geo. IV. ch. 14, the effect of payments is left as before Hence part payment not only would remove the statute as to the party paying, but also as to his co-promisors, in a joint or joint and several note. Burleigh *v.* Stott, 8 B. & C. 36; Pease *v.* Hirst, 10 id. 122. But by the 19 & 20 Vict. ch. 97, § 14, a part payment will revive a debt against the party who makes it, whether personally or by an agent, but it does not revive the debt against any co-promisor, or the executor or administrator of a co-debtor. See Nash *v.* Hodgson, 6 DeG. M. & G. 474, 31 Eng. L. & Eq. 555.

(*s*) Channell *v.* Ditchburn, 5 M. & W. 494.

(*t*) Atkins *v.* Tredgold, 2 B. & C. 23; Smith *v.* Townsend, 9 Rich. 44. Payment on a joint and several bond by a surviving obligor, after the death of his co-obligor, will not be binding on the latter's heirs. Disborough *v.* Jones, 1 N. J. 677. Payment of interest by the principal debtor, after the death of the surety, but before the statute has run against the note, does not prevent the surety's executors from pleading the statute. Lane *v.* Doty, 4 Barb. 530. But if the recognition of one debtor be before the death of his co-promisor, it renders the administrator of the latter also liable. Burleigh *v.* Stott, 8 B. & C. 36.

(*u*) Slater *v.* Lawson, 1 B. & Ad. 396; Smith *v.* Townsend, 9 Rich. 44.

(*v*) Tullock *v.* Dunn, Ryan & M. 416. The acknowledgment of an administrator is not enough, — there must be an express promise in order to bar the statute. Bunker *v.* Athearn, 35 Maine, 364. In some cases, it is held decidedly that an executor's or administrator's acknowledgment of a barred debt will not be binding against the estate, or the legatees and heirs or distributees, into whose hands the estate may have passed. Thompson *v.* Peter, 12 Wheat. 565; Fritz *v.* Thomas, 1 Whart. 66; Oakes *v.* Mitchell, 15 Maine, 360; Clarke *v.* Jenkins, 3 Rich. Eq. 318; Pitts *v.* Wooten, 24 Ala. 474; Moore *v.* Hillebrant, 14 Texas, 312; Riser *v.* Snoddy, 7 Ind. 442; Moore *v.* Hardison, 10 Texas, 467; Peck *v.* Botsford, 7 Conn. 172; Conoway *v.* Spicer, 5 Harring. Del. 425; Forney *v.* Benedict, 5 Barr, 225; Watts *v.* Devor, 1 Grant's Cas. 267. But see, on the other hand, Baxter *v.* Penniman, 8 Mass. 133; Emerson *v.* Thompson, 16 id. 429; Niemcewicz *v.* Bartlett, 13 Ohio, 271; Larason *v.* Lambert, 7 Halst. 247. The acknowledgment by an executor, at least if made before the debt is barred, is sufficient. Griffin *v.* The Justices, &c., 17 Ga. 96. And so the promise of an executrix was held to take the case out of the statute, in Northcut *v.* Wilkinson, 12 B. Mon. 408. In South Carolina, the administrator's promise would seem to be binding, if the debt was not barred in the intestate's lifetime, but not bind-

sentative capacity.(*w*) Nor will a payment by one co-executor revive a note as against his co-executors.(*x*) But all executors and administrators are bound by the payment or promise of the deceased.(*y*) And it seems, on the whole, — although the authorities are in conflict, — that an executor may waive the bar of the statute, and credit himself with payment of a debt against which the statute had run out, although an administrator cannot.

Payment of money into court does not revive a promise ; for it not only does not import an acknowledgment that anything more is due, but is in fact an express denial of this.(*z*)

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ing if it was barred. And so with an executor. M'Teer *v.* Hunter, Riley, 159. But in Pennsylvania, it is said to make no difference whether the executor's recognition was made before or after the debt was barred. In England, it is held that an executor who has not set up the statute may be bound as well in his beneficiary as in his representative capacity, by making part payments on accounts. Fordham *v.* Wallis, 10 Hare, 217, 17 Eng. L. & Eq. 182; Briggs *v.* Wilson, 17 Beav. 330, and more fully in 39 Eng. L. & Eq. 62.

(*w*) Atkins *v.* Tredgold, 2 B. & C. 23; Scholey *v.* Walton, 12 M. & W. 510. But see Griffin *v.* Ashby, 2 Car. & K. 139

(*x*) Scholey *v.* Walton, 12 M. & W. 510. An administrator's part payment will take the case out of the statute as against the administrator *de bonis non.* Semmes *v.* Magruder, 10 Md. 242.

(*y*) Burleigh *v.* Stott, 8 B & C. 36; Quynn *v.* Carroll, 10 Md. 197. And it has even been held that the testator's general acknowledgment of indebtedness was enough to allow the plaintiff to prove against his executors the specific amount. Peterson *v.* Ellicott, 9 id. 52.

(*z*) Reid *v.* Dickons, 5 B. & Ad. 499; Long *v.* Greville, 3 B. & C. 10. An acknowledgment by admission in the pleadings may be sufficient. Love *v.* Hackett, 6 Ga. 486. An acknowledgment of debt in an answer in equity removes the statute bar. Brigham *v.* Hutchins, 27 Vt. 569. In England it seems clear that the acknowledgment must be before action brought, because it is the subject of the declaration. Tanner *v.* Smart, 6 B. & C. 603; Rew *v.* Pettet, 1 A. & E. 196; Bateman *v.* Pinder, 3 Q. B. 574. So Bradford *v.* Spyker, 32 Ala. 134. But it may be queried whether the original promise is not sufficient to declare upon, and thus to institute the proceedings, leaving the new promise for the replication. At all events, the overruled doctrine was, that the recognition might be after suit brought, and that has had some support in this country. Rucker *v.* Hannay, 4 East, 604, note *a;* Yea *v.* Fouraker, 2 Burr. 1099; Lloyd *v.* Maund, 2 T. R. 760; Love *v.* Hackett, 6 Ga. 486; Danforth *v.* Culver, 11 Johns. 146. An acknowledgment after the debt is barred does not bind the party making it. Levistones *v.* Marigny, 13 La. Ann. 353; Luna *v.* Edmiston, 5 Sneed, 159. *Contra,* Carleton *v.* Ludlow Woollen Mill, 27 Vt. 496; Keener *v.* Crull, 19 Ill. 189, *Breese, J.* dissenting. The new promise or recognition is as good a replication to the plea of discharge in bankruptcy as to that of the statute of limitations. Hill *v.* Kendall, 25 Vt. 528; Horner *v.* Speed, 2 Patton & H. 616. But the payment of a dividend by the assignee in insolvency does not take the rest of the debt out. Roscoe *v.* Hale, 7 Gray, 274; Stoddard *v.* Doane, id. 387. But the payment of a dividend

The promise or acknowledgment may be made by the debtor himself, or by any agent of his having sufficient authority.(*a*) And it may be made to the creditor, or to his agent; (*b*) or it will be effectual if made to an entire stranger, according to some authorities.(*c*) Thus, not only a letter from one joint debtor to another was enough,(*d*) but a deed between acceptors and a third party, stating that the bill was outstanding and unpaid, took off the bar of the statute in favor of indorsees who sued the acceptors.(*e*) So a payment to a supposed adminis-

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by the assignees of one of two joint and several promisors has been thought to take the note out of the statute as against the solvent maker. Jackson *v.* Fairbank, 2 H. Bl. 340; Perham *v.* Raynal, 2 Bing. 306. But see Brandram *v.* Wharton, 1 B. & Ald. 463.

(*a*) Burt *v.* Palmer, 5 Esp. 145; Watts *v.* Devor, 1 Grant's Cas. 267. A wife acting as agent, therefore, may make a good acknowledgment, and an acknowledgment by the wife in her husband's presence, and tacitly assented to by him, will take the case out of the statute. Palethorp *v.* Furnish, 2 Esp. 511, note; Orcutt *v.* Berrett, 12 La. Ann. 178. So it is with her promise to pay money borrowed by her as agent for her husband. Burk *v.* Howard, 13 Misso. 241. The mere fact, however, that the agent contracted the original debt has been held to confer no implied authority to save it from the statute. Watts *v.* Devor, 1 Grant's Cas. 267. And if an agent thus exceed his authority, it will not remove the statute bar. Linsell *v.* Bonsor, 2 Bing. N. C. 241. Some cases, however, hold that an acknowledgment must be made strictly by the party in interest; and that an acknowledgment in writing signed by an agent is not sufficient. Hyde *v.* Johnson, 2 Bing. N. C. 776; Martin *v.* Bridges, 3 Car. & P. 83; Irving *v.* Veitch, 3 M. & W. 90. These decisions result from the 9 Geo. IV. ch. 14, and the similar statutes in this country, under which the acknowledgment must be signed by the party to be charged. But the agent's written admission now binds his principal under the 19 & 20 Vict. ch. 97, § 13. An acknowledgment in writing given by an infant of a debt due for necessaries is sufficient to charge him. Willins *v.* Smith, 4 Ellis & B. 180, 28 Eng. L. & Eq. 276.

(*b*) The acknowledgment must be to creditor or his agent, and not to a stranger. Bloodgood *v.* Bruen, 4 Seld. 362; Kyle *v.* Wells, 17 Penn. State, 286; Gillingham *v.* Gillingham, id. 302; Pearson *v.* Darrington, 32 Ala. 227. See *supra*, note *a*; Hill *v.* Kendall, 25 Vt. 528. It must be to the creditor, or his agent, or to a third person, with intent to influence the action of the creditor. Wakeman *v.* Sherman, 5 Seld. 85. Compare with the latter case Barger *v.* Durvin, 22 Barb. 68. *supra*, p. 654, note *f*.

(*c*) Peters *v.* Brown, 4 Esp. 46; Megginson *v.* Harper, 2 Cromp. & M. 322; Whitney *v.* Bigelow, 4 Pick. 110; Watkins *v* Stevens, 4 Barb. 168; Carshore *v.* Huyck, 6 id. 583; Bloodgood *v.* Bruen, 4 Sandf. 427; Philips *v.* Peters, 21 Barb. 351; Minkler *v.* Minkler, 16 Vt. 193; Brookes *v.* Chesley, 4 Gill, 205; Oliver *v.* Gray, 1 Har. & G. 204; Smith *v.* Campbell, 5 Harring. Del. 380; Collett *v.* Frazier, 3 Jones, Eq. 80. Or in general to the party in interest, if made after the debt is barred. Keener *v.* Crull, 19 Ill. 189.

(*d*) Halliday *v.* Ward, 3 Camp. 32.

(*e*) Mountstephen *v.* Brooke, 1 B. & Ald. 224. An acknowledgment to a prior holder of a bill or note has been held a good replication when made by a subsequent holder. Gale *v.* Capern, 1 A. & E. 102. But see Cripps *v.* Davis, 12 M. & W. 159. In New York, a new promise to the payee is good to his assignee also, *in* suing

trator whose letters were invalid revived the debt in favor of a subsequent administrator under valid letters.(*f*) And it has been held that an advertisement in a newspaper by an executor, that he will pay all debts justly due from his testator, will protect a debt from the operation of the statute.(*g*) But this is certainly an extreme case, and is, in our opinion, not law. If one and the same debt is secured by different instruments, payment of interest on any one of them will revive or protect the debt as to all.(*h*) No promise revives a debt unless the promise is legal and binding. Hence a promise made on Sunday has no effect.(*i*)

Much question has formerly been made as to the effect of an indorsement of interest, or part payment made upon a note by the creditor. The rule seemed to be at length established, that if he made this indorsement before the debt was barred, it was admissible evidence to protect the debt from the statute, because it was an admission by the creditor against his own interest; (*j*) but if it were made after the note was barred, it was no longer against his interest, but the reverse.(*k*) This rule, however, is

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the maker under the new code, providing that the action is brought in the name of the real party in interest. Clark *v.* Atkinson, 2 E. D. Smith, 112. So it was in Dean *v.* Hewit, 5 Wend. 257; Bird *v.* Adams, 7 Ga. 505. So it is, if the promise was made before it was barred, though the plaintiff take the note after it is barred. Thompson *v.* Gilreath, 3 Jones, 493.

(*f*) Clark *v.* Hooper, 10 Bing. 480.

(*g*) Jones *v.* Scott, 1 Russ. & M. 255.

(*h*) Dowling *v.* Ford, 11 M. & W. 329. A payment by a debtor on an obligation to be paid in instalments, without directing on which, when all the instalments were due, is supposed to be on the whole debt, and hence prescription on all the instruments is interrupted. Nesom *v.* D'Armond, 13 La. Ann. 294. But payment of money into court on a note payable by instalments only admits that so much money was due, and does not bar the statute on the balance. Reid *v.* Dickons, 5 B. & Ad. 499, *supra*, p. 660, note *z*.

(*i*) Bumgardner *v.* Taylor, 28 Ala. 687.

(*j*) Smith *v.* Simms, 9 Ga. 418; Addams *v.* Seitzinger, 1 Watts & S. 243; Chandler *v.* Lawrence, 3 Mich. 261; Evans *v* Smith, 34 Maine, 33; Wood *v.* Wylds, 6 Eng. Ark. 754.

(*k*) Clapp *v.* Ingersol, 11 Maine, 83; M'Gehee *v.* Greer, 7 Port. 533; Beatty *v.* Clement. 12 La. Ann 82. Indorsement of part payment on a note by the holder, at the express request of the promisor, revives the note. Sibley *v.* Phelps, 6 Cush. 172. And so it does, if made in the debtor's handwriting, as being evidence of a new promise. Jones *v.* Jones, 1 Foster, 219. And so it does, if made in the holder's handwriting, if joined with testimony that the defendant had since said that he would pay the balance. Howe *v.* Saunders, 38 Maine, 350. And, in general, the credit on account must appear to have been by actual payment, or with the privity of the defendant.

open to the serious objection, that an entry while the note is still enforcible, but near the period of limitation, is almost as much in favor of the creditor, and almost as likely to be made in fraud, as one made a short time later.(*l*) By recent statute, in some of our States, no such indorsement for or of the party to whom or on behalf of whom the payment is made shall have the effect of removing the statutory bar. And it has been suggested, that now an indorsement of principal or interest should be made by the debtor, and signed by him, to take the case from the statute, and by the creditor or holder of the note to protect the debtor.

The statutes of limitation do not ordinarily run against claims by the State, except by express provision for that purpose.(*m*)

Elliott *v.* Mills, 10 Ind. 368. Hence the rule often adopted is, that the indorsement of part payment made by the holder of the note, or in his behalf, is not sufficient evidence of revival, unless it is first proved by evidence *aliunde* to have been made before the account was barred, and, consequently, against the interest of the party making it. Maskell *v.* Pooley, 12 La. Ann. 661; Beatty *v.* Clement, id. 82; Alston *v.* State Bank, 4 Eng. Ark. 455; Brown *v.* Hutchings, 14 Ark. 83; Ruddell *v.* Folsom, id. 213. In England (see Chitty on Bills, 394), it seems that the holder's indorsement of part payment made to him will be presumed to have been written when it bears date. Smith *v.* Battens, 1 Moody & R. 341; Anderson *v.* Weston, 6 Bing. N. C. 296. And when admitted, it may go to the jury as evidence of payment. Trentham *v.* Deverill, 3 id. 397; Malpas *v.* Clements, 19 Law J., N. S., Q. B. 435; Potez *v.* Glossop, 2 Exch. 191.

(*l*) See Smith *v.* Simms, 9 Ga. 418. And when a small credit of $5.00 on a note otherwise barred was found a payment by the jury, there being also some testimony showing that it was not made *bona fide*, a new trial was ordered. Chambers *v.* Walker, 4 Rich. 548. See also Williams *v.* Alexander, 5 Jones, 162.

(*m*) Troutman *v.* May, 33 Penn. State. 455; State *v.* Fleming, 19 Misso. 607; Mahone *v.* Central Bank, 17 Ga. 111; Josselyn *v.* Stone, 28 Missis. 753; People *v.* Clarke, 5 Seld. 349; Hill *v.* Josselyn, 13 Smedes & M. 597; Walls *v.* M'Gee, 4 Harring. Del. 108; People *v.* Van Rensselaer, 8 Barb. 189; Kennedy *v.* Townsley, 16 Ala. 239; Levasser *v.* Washburn, 11 Gratt. 572. Nor does the statute run against the United States. McNamee *v.* U. S., 6 Eng. Ark. 148; U. S *v.* Williams, 5 McLean, 133; Iverson *v.* Dubose, 27 Ala. 418. The principle is, *nullum tempus occurrit reipublicæ*. So the statute does not run against the grantee of government, it is said, until government has divested itself of the titles. Kennedy *v.* Townsley, 16 Ala. 239. But if the occupant be permitted to hold land for a time fixed by the law as imparting dominion over property, the claim of government will not be good, as is held in Texas, for *nullum tempus* does not apply. Jones *v.* Borden, 5 Texas, 410. It has there also been held to run against the State suing an official for money collected. State *v.* Purcell, 16 Texas, 305. And it will always run against counties. County of St. Charles *v.* Powell, 22 Misso. 525.

APPENDIX.

[Many of the pages of this Appendix have been changed to bring it into conformity with the Stamp Act of 1864.]

CONCERNING THE STAMPS REQUIRED BY THE STATUTES OF THE UNITED STATES FOR PROMISSORY NOTES, BILLS OF EXCHANGE, CHECKS ON BANKS, AND OTHER INSTRUMENTS OF SIMILAR CHARACTER.

The Statute of the United States, 1864, Chapter CLXXIII., entitled, "An Act to provide Internal Revenue to support the Government and to pay Interest on the Public Debt," requires that stamps should be affixed to Bills of Exchange, Promissory Notes, Checks on Banks, orders and drafts for money, and other similar instruments.

The provisions of this statute are much more simple and direct than those of the English stamp-acts, as they are called. Much litigation has arisen in England concerning those acts. But many of the questions which have come before the courts of England relate to the construction and application of provisions which are not contained, or of language which is not used, in the statute of the United States. From these cases we can derive but little benefit. But those which relate to provisions or language similar to our own may be usefully considered. The English stamp-acts are very numerous, and a duty was imposed in this way many years ago.(*a*) The legal ques-

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(*a*) A revenue has been raised in England by means of stamps for a very long time; but before the statute 22 Geo. III. c. 33, there was no stamp duty imposed on bills or notes, and, indeed, they were expressly exempted from any stamp duty by the 5 W. and M. c. 21, § 5; but, by the first-mentioned statute, certain duties were imposed in almost all cases upon these instruments. This and two subsequent statutes (23 Geo. III. c. 49, and 24 Geo. III. § 1, c. 7) were repealed, as regards the amount of duties, by the 31 Geo. III. c. 25, whereby certain larger duties were imposed; and, by the 19th section of that statute, it was enacted that the stamp must be impressed before a bill or note was printed or written. The duties were increased by the 37 Geo. III. c. 90, which con-

tions to which they have given rise are often difficult, and were very carefully considered. The decisions of those courts might have some influence in the courts of this country, as precedents; and certainly would have the respect paid to them which was due to their reasonableness and their conformity with the principles of law.

It must be remembered, that questions in relation to the construction and application of our statute imposing stamps will not be confined to the United States courts. They may come before any court, on the trial of any action grounded upon or defended by an instrument which was, or should be, stamped. And in any action in which such an instrument was offered in evidence.

Most of the questions as to the construction and application of our statute, which are considered in this Appendix, are without authoritative decision. The law in regard to them cannot be certainly known until competent tribunals have made it certain; or a usage grows up having the force of law. We can do no more than offer the best opinions we can form, without attempting to give positive answers to many of these questions.

The sections of the statute of the United States which relate especially, or directly, to bills, notes, checks, or similar instruments, are the following: —

"Sec. 151. *And be it further enacted*, ... That on and after the first day of August, eighteen hundred and sixty-four, there shall be levied, collected, and paid, for and in respect of the several instruments, matters, and things mentioned, and described in the schedule (marked B) hereunto annexed, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several duties or sums of money set down

tinued in force until the 10th October, 1804; and from that day until the 11th October, 1808, the 44 Geo. III. c. 98 regulated the amount of the duty; after that day, and until the 28th September, 1815, the duties on bills and notes were regulated by the 48 Geo. III. c. 149; and from the last-mentioned period until recently, the amount of duty was ascertained by the 55 Geo. III. c. 184. On the 10th October, 1853, the altered stamp duties on drafts or orders for the payment of money to bearer on demand came into operation, under the 16 and 17 Vict. c. 59; and on the 10th October, 1854, the altered stamp duties imposed on bills and notes, under the 17 and 18 Vict. c. 83.

in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

"SEC. 153. *And be it further enacted*, That no instrument, document, writing, or paper of any description, required by law to be stamped, shall be deemed or held invalid and of no effect for the want of the particular kind or description of stamp designated for, and denoting the duty charged on, any such instrument, document, writing, or paper, provided a legal stamp or stamps denoting a duty of equal amount shall have been duly affixed and used thereon."

"SEC. 155. *And be it further enacted*, That if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made, or used in pursuance of this act, or shall forge, counterfeit, or resemble, or cause, or procure to be forged, counterfeited, or resembled, the impression, or any part of the impression, of any such stamp or die, as aforesaid, upon any vellum, parchment, or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment, or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die, as aforesaid, with intent to defraud the United States of any of the duties hereby imposed, or any part thereof, or if any person shall utter, or sell, or expose to sale, any vellum, parchment, or paper, article or thing, having thereupon the impression of any such counterfeited stamp or die, or any part of any stamp or die, or any such forged, counterfeited, or resembled impression, or part of impression, as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall knowingly use any stamp or die which shall have been so provided, made, or used, as aforesaid, with intent to defraud the United States; or if any person shall fraudulently cut, tear, or remove, or cause or procure to be cut, torn, or removed, the impression of any stamp or die which shall have been provided, made, or used in pursuance of this act, from any vellum, parchment, or paper, or any instrument or writing, charged or chargeable with any of the duties hereby imposed; or if any person shall wilfully remove, or cause to be removed, from any stamped envelope the cancelling or defacing marks thereon with intent to use the same, or cause the use of the same, the second time, or shall knowingly or wilfully sell or

buy such washed or restored stamps, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same, or prepare the same with intent for the second use thereof, then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting in committing any such offence as aforesaid, shall be deemed guilty of felony; and shall, on conviction thereof, forfeit the said counterfeit stamps and the articles upon which they are placed, and be punished by fine not exceeding one thousand dollars, or by imprisonment and confinement to hard labor not exceeding five years, or both, at the discretion of the court.

"SEC. 156. *And be it further enacted*, That in any and all cases where an adhesive stamp shall be used for denoting any duty imposed by this act, except as hereinafter provided, the person using or affixing the same shall write thereupon the initials of his name, and the date upon which the same shall be attached or used, so that the same may not again be used. And if any person shall fraudulently make use of an adhesive stamp to denote any duty imposed by this act without so effectually cancelling and obliterating such stamp, except as before mentioned, he, she, or they shall forfeit the sum of fifty dollars. . . . . .

"SEC. 157. *And be it further enacted*, That the commissioner of internal revenue be, and he is hereby, authorized to prescribe such method for the cancellation of stamps, as substitute for, or in addition to, the method now prescribed by law, as he may deem expedient and effectual. . . . . .

"SEC. 158. *And be it further enacted*, That any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft, or order, or promissory note, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall, for every such offence, forfeit the sum of two hundred dollars, and such instrument, document, or paper, bill, draft, order, or note, shall be deemed invalid and of no effect: . . .

"SEC. 159. *And be it further enacted*, That the acceptor or acceptors of any bill of exchange or order for the payment of any sum of money drawn, or purporting to be drawn, in any foreign

country, but payable in the United States, shall, before paying or accepting the same, place thereupon a stamp indicating the duty upon the same, as the law requires for inland bills of exchange, or promissory notes; and no bill of exchange shall be paid or negotiated without such stamp; and if any person shall pay or negotiate, or offer in payment, or receive or take in payment, any such draft or order, the person or persons so offending shall forfeit the sum of two hundred dollars.

"SEC. 160. *And be it further enacted*, That no stamp duty shall be required . . . . . to any indorsement of a negotiable instrument or on any warrant of attorney accompanying a bond or note, when such bond or note shall have affixed thereto the stamp or stamps denoting the duty required; and whenever any bond or note is secured by a mortgage, but one stamp shall be required to be placed on such papers: *Provided*, That the stamp duty placed thereon shall be the highest rate required for said instruments, or either of them.

"SEC. 161. *And be it further enacted*, That . . . . . the Commissioner of Internal Revenue may from time to time make regulations for the allowance of such of the stamps issued under the provisions of this act as may have been spoiled or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been paid in error or remitted; and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment, the sum of five per centum to the owner thereof.

"SEC. 162. *And be it further enacted*, That it shall be lawful for any person to present to the collector of the district, subject to the rules and regulations of the commissioner of internal revenue, any instrument not previously issued or used, and require his opinion whether or not the same is chargeable with any stamp duty; and if the said collector shall be of opinion that such instrument is chargeable with any stamp duty, he shall, upon the payment therefor, affix and cancel the proper stamp; and if of the opinion that such instrument is not chargeable with any stamp duty, or is chargeable only with the duty by him designated, he is thereby required to impress thereon a particular stamp, to be provided for that purpose, with such words or device thereon as he

shall judge proper, which shall denote that such instrument is not chargeable with any stamp duty, or is chargeable only with the duty denoted by the stamp affixed; and every such instrument, upon which the said stamp shall be impressed, shall be deemed to be not chargeable, or to be chargeable only with the duty denoted by the stamp so affixed, and shall be received in evidence in all courts of law or equity, notwithstanding any objections made to the same by reason of it being unstamped, or of it being insufficiently stamped.

"SEC. 163. *And be it further enacted*, That no deed, instrument, document, writing, or paper, required by law to be stamped, which has been heretofore signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of duty, shall have been affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon by the person using or affixing the same; and the person desiring to use or record any such deed, instrument, document, writing, or paper as evidence, his agent or attorney, is authorized in the presence of the court, register, or recorder, respectively, to affix the stamp or stamps thereon required. . . . . .

SCHEDULE B.

STAMP DUTIES.

Agreement or contract, other than those specified in this schedule; any appraisement of value or damage, or for any other purpose; for every sheet or piece of paper upon which either of the same shall be written, five cents. $0.05

Provided, That if more than one appraisement, agreement, or contract shall be written upon one sheet or piece of paper, five cents for each and every additional appraisement, agreement, or contract.

BANK CHECK, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, or for any sum exceeding ten dollars drawn upon any other person or persons, companies, or corporations, at sight or on demand, two cents. . . 2

BILL OF EXCHANGE (inland), draft, or order for the payment of any sum of money not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note (except bank notes used for circulation, and checks made and intended to be presented forthwith, and which shall be presented to a bank or banker for payment), or any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand, or at a time designated, for a sum not exceeding one hundred dollars, five cents. . . 5

And for every additional hundred dollars, or fractional part thereof in excess of one hundred dollars, five cents. 5

BILL OF EXCHANGE (foreign), or letter of credit, drawn in but payable out of the United States, if drawn singly, or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay the same rates of duty as inland bills of exchange or promissory notes. . . . . .

If drawn in sets of three or more: For every bill of each set, where the sum made payable shall not exceed one hundred dollars, or the equivalent thereof, in any foreign currency in which such bills may be expressed, according to the standard of value fixed by the United States, two cents. 2

And for every additional hundred dollars or fractional part thereof in excess of one hundred dollars, two cents. . 2

PROTEST.—Upon the protest of every note, bill of exchange, acceptance, check or draft, or any marine protest, whether protested by a notary public or by any other officer who may be authorized by the law of any State or States to make such protest, twenty-five cents. 25

OF THE CONSTRUCTION OF THE STATUTE.

Many principles are applied to the construction of statutes which need not here be considered. There is, however, one which may be of some importance. It is that which requires a court, when the meaning of a statute is ambiguous, to construe its language somewhat strictly, rather than in such wise as to enlarge its scope or operation.

We should be disposed to infer this, as a rule of construction of any statute, from the familiar principle which has some force in the construction of all documents or instruments between private parties, and requires that they should be construed *contra proferentem*. The reason is obvious. A party who makes an instrument and proffers it to another, makes it what he chooses, and must, therefore, at his own peril, cause it to express distinctly all that he intends by it. And if it be fairly capable of two meanings, he cannot complain if the party who only accepts it elects the meaning most favorable to himself.

This reason would seem to have some application to a general statute, made by the people through their agents, the legislature. And it is generally admitted to have much force when and so far as the statute is in its nature a penal statute.(*b*) And we should say that this Revenue Statute, which requires certain conduct and forbids certain conduct, under heavy penalties, is so far a penal statute that the principle above stated should apply to it. And it will be seen in our note that this principle has been applied in this country to statutes concerning taxes.(*c*)

It is true that the 162d section of the act gives to the Commissioner of Internal Revenue the power and duty of deciding, when called upon to do so, whether any instrument is chargeable with any duty. This power has somewhat of a judicial character. But the Commissioner, in exercising it, may be expected to regard the recognized principles of legal construction; and it cannot be supposed that this section is intended to take from the courts their judicial power, further than the words of

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(*b*) Blackstone confines this principle to penal statutes; or, rather, he applies it to no other. 1 Bl. Com. 88. But it is well said by Sharswood, in a note to his valuable edition of Blackstone, that all laws made in derogation of common right are to be construed strictly. This has been held in a great variety of cases. As in a statute disabling persons from making contracts. Smith *v.* Spooner, 3 Pick. 229. A statute conferring privileges. Sprague *v.* Birdsall, 2 Cowen. 419; Young *v.* McKensie, 3 Kelly, 31; Mayor *v.* Railroad Co., 7 Georgia, 22; Railroad Co. *v.* Briggs, 2 New Jersey, 623. A statute involving liberty. Pierce's Case, 4 Shipley, 255. It has been held in the case of a statute exempting property from taxation. Cincinnati *v.* Ohio, 19 Ohio, 110. In a statute authorizing taxation. Mosely *v.* Tift, 4 Florida, 402. And in a statute levying a tax. Sewall *v.* Jones, 9 Pick. 412. At the same time, it must be remembered that no interpretation will be adopted which must defeat the purpose of the law, provided the language of the statute admits, fairly and rationally, of an interpretation which sustains that purpose. United States *v.* Wiltberger, 5 Wheat. 76; The Emily and Caroline, 9 Wheat. 388.

(*c*) See preceding note.

the section do this; or that the courts would not acknowledge and make use of those principles of construction.

WHAT INSTRUMENTS ARE EXEMPTED FROM THE REQUIREMENTS OF THE STATUTE.

The English statutes contain many provisions on the subject of instruments exempted from the necessity of stamps; and these provisions are very specific. The statute of the United States contains very few provisions of this kind, and they are quite general in their terms. Nor can we ascertain what instruments are thus exempt, otherwise than by noting what instruments are not within the express language of the statute, or brought within its scope by legal construction.

Perhaps the first question of this kind would relate to instruments which are either called on their face, or purport to be, or are in their general form, bills or notes or drafts or orders or checks, but which are payable on some uncertainty, or on some contingency, or in something other than money as stock or chattels, or in which the sum payable is not certain, and which, for that reason, are not within the legal definition of notes or bills.(*cc*)

In England, it has been repeatedly held that stamps were requisite in some cases of this kind, in part, at least, because the courts held it to be the object of the legislature to treat as bills or notes, for the purpose of revenue, instruments which could not in strictness fall under that denomination.(*d*) We have some doubts whether the principle of construction which requires that a penal statute be construed strictly, would not have prevented this extension of the operation of the act, had it not been for the words of the English statute expressly relied upon as a ground of the decision, — "All bills, drafts, or orders for the payment of any sum of money out of any particular fund which may not be available, or upon any contingency which may or may not be performed."(*e*) And the English

(*cc*) See *ante*, Vol. I pp. 37, 42, 60.

(*d*) So said by Lord Ellenborough, in Firbank *v.* Bell, 1 B. & Ald. 39.

(*e*) See Butts *v.* Swan, 2 Br. & Bing. 78; Emly *v.* Collins, 6 M. & S. 144; Firbank *v.* Bell, 1 B. & Ald. 36. In Butts *v.* Swan, the instrument in question was this: "Gentlemen, we request you will pay to Messrs. N. C. & Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 600 pounds, and charge the same to our account." *Dallas*, C. J. said: —

cases draw a distinction, requiring the stamp on instruments where a certain sum is payable on a contingency, but not on

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"This case is narrowed to a single point; it is unnecessary, therefore, to discuss the others which have been raised; for the important point now to be considered is, whether this instrument falls within the different provisions of the act referred to. It is agreed that, if this instrument constitutes a bill of exchange, it could not be stamped after it was issued: if, therefore, this be an order for the payment of money, and if an order for the payment of money stand upon the same footing as a bill of exchange by the provisions of the 55 Geo. III. c. 184, the argument against its admission in evidence would be conclusive.

"Does it, then, stand on the same footing as a bill of exchange by virtue of that act? Now, the stamp is imposed on bills, drafts, or orders for the payment of money, the act classing them together: then, in a subsequent part of the schedule, bills, drafts, and orders for the payment of money at a future day, are made liable to the duties imposed by the act; and all bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, are, by that act, to be deemed bills, drafts, or orders for the payment of money within the schedule of the act.

"By the 8th section, all the provisions of the former acts are made to apply to the subject-matter of the latter.

"An order for the payment of money seems to me, therefore, as far as the purposes of this act are concerned, to be placed on the same footing with bills of exchange and promissory notes; and, if it be so placed, no distinction can be drawn, after the express provision in the 55 Geo. III., between orders for the payment of money out of a particular fund, and bills and notes in general. Without saying, therefore, that the statute alters the nature of instruments, or makes that a bill of exchange which would not otherwise be such, it is clear that, under the 55 Geo. III., orders of this description fall within the same provisions as bills of exchange and promissory notes. And this seems to me to be decided by the case of Firbank *v.* Bell, a case essentially the same as that before the court."

Adverting, therefore, to the distinction which exists, independently of the statute, between bills and notes payable at all events and orders payable out of a particular fund, the learned Chief Justice says, that the object of the statute was to put those instruments which before differed from the former class on the same footing with them. "I see no difficulty, therefore, in this case on principle, and on authority it falls within the decision before mentioned, unless the instrument is to be considered as an agreement, and not as an order for payment of money. The argument for that position appears to me to be a fallacy. The order is complete when it issues, and does not depend upon any subsequent assent to make it a valid order. According to the doctrine contended for, no order can be considered absolute if followed by a subsequent correspondence. But a similar order, though succeeded by a correspondence, has, in Firbank *v.* Bell, been considered an absolute order: I think that this is such, and that it ought to have received a stamp, in conformity with the provisions of the statute 55 Geo III."

Park, J.: "The only question now to be determined in this case is, whether these papers were properly stamped. It is admitted at the bar that they fall within the provision of the act, unless they can be distinguished from the subject-matter on which the act was intended to operate. I think this is not a bill of exchange, and have no wish to disturb the old authorities, which say that an order to pay out of a contingent

those in which the sum payable is itself uncertain.(*f*) And among the express exemptions in the English stamp-acts now in force are promissory notes payable from a fund which may not be available, or on a contingency which may not happen; and all other instruments in the form and style of promissory notes, "but which in law shall be deemed special agreements"; and all such instruments must be stamped as agreements.(*g*) But this exemption does not include bills of exchange.

So far as the language of the statute of the United States goes, it must be remembered that by the first clause of Schedule B

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fund is not a bill of exchange. This brings us to consider whether it was the object of the statute 55 Geo. III. c. 184, to subject instruments like the present to the same provisions as bills of exchange and promissory notes; and that such was the object of that act seems to me clear, from the words, 'All bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any contingency which may or may not be performed,' &c. Such instruments were not taxable before; but by the last-mentioned statute they are put on the same footing as bills of exchange and promissory notes; and in this opinion I am borne out by the language of Lord *Ellenborough* in Firbank *v.* Bell; for that learned person seems to have had in his mind the very point raised here, — viz. that the intent of the act would be pursued if this were considered an agreement. His Lordship says, speaking of the order of payment, 'It falls, then, within the description of the act of Parliament, — viz. an order for the payment of money out of a fund which may or may not be available.' That case goes the whole length of the doctrine contended for by the plaintiffs. The order here is an order for the payment of money, notwithstanding the ingenious argument, that the whole correspondence forms but one agreement." Butts *v.* Swan, 2 Br. & Bing. 84.

(*f*) In a case where A, having consigned goods to B, sent him the following order, "Pay to A. B. the proceeds of a shipment of goods, value about £2,000, consigned by me to you," and C, by writing, consented to pay over the full amount of the net proceeds of the goods, it was held that neither of these instruments required such a stamp as is imposed by this act on drafts, bills, or orders for the payment of money, because no particular sum was named. Jones *v.* Simpson, 2 B. & C. 318; and see Barlow *v.* Broadhurst, 4 Moore, 471; Crowfoot *v.* Gurney, 9 Bing. 372. So it was held necessary that the instrument should make the money payable to the bearer, or to order, or be delivered to the payee, or some person on his behalf; and therefore the following letter, sent to the holders of the fund out of which payment is to be made, was held not to require a bill stamp: "We now authorize you to pay to Messrs. R. & Co. (having revoked the former order in their favor), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of £5,000. H. & J." For after delivery to the payee, or some person on his behalf, means a delivery either personally to the payee or to the home agent or representative of his, and does not mean the person to whom the order is addressed. Hutchinson *v.* Heyworth, 9 A. & E. 375; Norris *v.* Solomon, 2 M. &. R. 266; Chitty, 67, note 1.

(*g*) See statutes of 16 and 17 Vict. and 17 and 18 Vict.

every "agreement or contract other than those specified in this schedule" is to be stamped in a certain way.

Then, that the words above quoted from the 55 George III. are not in the statute of the United States, while the law of this country defining bills of exchange is the same as in England.

Then the question would seem to be narrowed to this. Do the words "bill of exchange, draft, or order for the payment of money," in the statute of the United States, mean the same that these words do in the English act, where they are accompanied by words which certainly explain, if they do not enlarge, their meaning? It is impossible to give a certain answer to this question. But, as the question was pressed upon the English courts, — although the enlarging words were in their statute, — and was deemed worthy of careful consideration, and the decision rested, perhaps, mainly on the presence and force of these words, we think it open to doubt whether a court in this country would supply these words by legal construction. (*gg*)

We should be still more doubtful of such a construction in the case of promissory notes. For if an instrument purporting to be a bill of exchange be not that, it may still be a *draft* or *order*, and so come under the statutory requirement. But while a promissory note may, for some purposes, be treated as a bill of exchange,(*h*) it cannot reasonably be regarded as a draft or order. If, then, it purports to be a promissory note, and is not that by the definition of the law, we should say that it would come under the requirement of the statute only as an agreement. It may be, however, that the courts would say that the statute should be construed in a popular sense, and includes as promissory notes all instruments popularly but not technically regarded as being so.

In regard to all instruments which are checks, bills, notes, drafts, or orders, — as the requirement of stamps is determined by the amount payable, and (except as to checks, or drafts or orders in the nature of checks) varies with that amount, and can be measured only by that amount, — we should say that no instrument for the payment of money, where the amount is entirely uncertain, could be subjected to any other stamp than that of an agreement. We say *entirely* uncertain, because the courts

(*gg*) By ruling No. 251, (Boutwell's Tax System, pg. 342,) a note payable in merchandise is considered as subject to the same stamp duty as though payable in money. (*h*) See *ante*, Vol. I. pp. 29, 288.

would undoubtedly apply the rule, *id certum est quod certum reddi potest.*(*i*)

OF LETTERS OF CREDIT.

A letter of credit comes within the express language of the statute, — "bill of exchange (foreign), or letter of credit." But in the clause relating to a "bill of exchange (inland)," the word "letter of credit" does not occur; and we do not see how an *inland* letter of credit can be brought within this clause by construction.

If the foreign letter of credit were for an indefinite and unlimited amount, we should say that it would not be subject to the requirement of a stamp, for the reason above stated in reference to bills or notes for an uncertain sum, even if it could be stamped as an agreement, which might perhaps be doubted. But if it authorize a party to draw at such times as he pleases, and for such amounts as he pleases, but not to exceed in the whole a certain sum, we should say that it would require a stamp as for this sum.

OF INLAND AND FOREIGN BILLS.

Our States are held to be foreign to each other in respect to bills of exchange, by our law merchant.(*j*) But this construction might seem to be negatived by the words of the statute. The first paragraph about bills begins, "Bill of exchange (inland)." The next paragraph begins, "Bill of exchange (foreign), or letter of credit, drawn in but payable out of the United States." And we should say that this language would determine that foreign bills of exchange or letters of credit, for all the purposes of both paragraphs, are only those which are drawn in and payable out of the United States.

OF BANK CHECKS.

The provisions of the English statutes in respect to checks on banks, or bankers, are minute and complicated, and have given rise to some questions which need not be considered here, as the language of our statute avoids or prevents them.

(*i*) See *ante*, Vol. I. p. 31.

(*j*) See *ante*, Vol. I. pp. 56, 57.

OF NOTES OR BILLS ON DEMAND.

Where notes or bills are not expressly payable at sight or on demand, and not on any specific time, that is, where all reference to the time of payment is omitted, they are held by the law merchant of this country to be payable on demand, and this so conclusively, that no evidence is receivable of any bargain or intention to make them payable otherwise than on demand.(*k*) It has been held in England, that such notes or bills must be stamped as demand notes or bills,(*l*) and would doubtless be so held here.

OF PRINCIPAL AND INTEREST.

Bills, drafts, or notes may be payable for a certain amount, with interest. If the interest is included in the principal, that principal is, of course, the amount for which the stamp is required. But it has been decided in England that a note or bill which mentions the principal sum, and adds, "with interest," needs only the stamp which the principal requires.(*m*) And that would undoubtedly be the rule in this country. Thus, a note promising to pay in six months "one hundred dollars, with interest," could only be discharged by payment of one hundred and three dollars (where the legal interest was six per cent). But it would require only the stamp for a note "not exceeding one hundred dollars."

THE REISSUE OF BILLS OR NOTES.

The English statutes contain some provisions on this subject. There have been some decisions of questions which have arisen from the reissue of bills and notes, and generally under those provisions.(*n*) The statute of this country is silent on this sub-

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(*k*) See *ante*, Vol. I. p. 381.

(*l*) Whitlock *v.* Underwood, 2 B. & C. 157. But a note, "I promise to pay to Mary Meager the sum of one hundred pounds for value received," was held not to be payable to bearer on demand. And see Dixon *v.* Chambers, 1 C. M. & R. 845.

(*m*) Prenssing *v.* Ing, 4 B. & Ald. 204; Wills *v.* Noot, 4 Tyrw. 726.

(*n*) Cheetham *v.* Butler, 5 Bar. & Ad. 837; Dixon *v.* Chambers, 1 C. M. & R. 845;

ject. But the principle applicable to it must be this. A note or bill which has been duly stamped may afterwards be negotiated to any extent or used in any way which may fairly be regarded as a use of the same bill or note. But an instrument once stamped and issued cannot afterwards be employed in an original and independent use, or, in other words, it cannot be used for the purposes and in the manner for which a new instrument might more properly be made, and probably would be made but for the requirement of the stamp; for this would be an unquestionable evasion of the statute.

WHEN THE STAMP SHOULD BE AFFIXED.

In England the stamp-acts require that the stamps should be impressed on bills and notes before they are written.(*o*) Nor does there seem to be anywhere authority to impose the proper stamp after the instrument is completed, unless a stamp of equal or higher value, but of an erroneous denomination, had been previously affixed.(*p*)

The statute of the United States has no other provisions on this subject than those which are contained in, or may be implied from, sections 158 and 161. Section 158 declares that, "Any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, &c., without the same being duly stamped for denoting the duty hereby imposed upon it, or without having thereupon an adhesive stamp to denotes aid duty,"—shall incur the penalty named, and the instrument shall be wholly void.

If "make, sign, or issue" are to be read as distinct and alternative expressions, no note or bill can be valid if the maker *sign* it before affixing the stamp; and he would incur a penalty for so doing. But this cannot be the meaning of the law. That meaning is, undoubtedly, that he must not issue or deliver

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Callow *v.* Lawrence, 3 M. & S. 95; Williams *v.* James, 15 Q. B. 498; Jones *v.* Broadhurst, 9 C. B. 173; Belshaw *v.* Bush, 11 C. B. 191; Jewell *v.* Parr, 16 C. B. 684; Lazarus *v.* Cowie, 3 Q. B. 459.

(*o*) The early statute of the 1st Anne, Stat. 2, ch. 22, §§ 2 and 3, requires this of all instruments; and this provision does not seem to have been repealed. A similar requirement may be found in or inferred from 23 Geo. III. ch. 49, § 14.

(*p*) This appears to be provided for in statute 31 Geo. III. ch. 25, § 19.

the note, (and a bill or note is not *made* in law until it be delivered,)(*q*) until he affix to it the proper stamp.

The question is more difficult, whether he can alter the date, and use it appropriately, but at a different time. This question is much the same as whether a stamp is ruined for use by a mistake in the date; as if a person on the 10th of July, supposing it to be the 9th, puts that date on it, and then discovers the error, can he alter it to the 10th? It may be that the danger of fraud will induce the courts to hold that a date once affixed must always remain. But on general principles we know not why a person might not correct an innocent error. But if the date were changed it would be a suspicious circumstance, calling for excuse and explanation, and the trouble or difficulty of giving it might far exceed the value of the stamp. It may be that the provisions in that part of the 161st section above quoted, in relation to stamps which "may have been spoiled or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake have been improperly or unnecessarily used," would be held applicable to some of the cases we have considered.

If the note were issued without any stamp, it would be no note. We know not why the proper stamp might not be subsequently affixed, and render the note valid from that time. But such a note could not, we think, be made valid as to any previous parties, who did not assent to and authorize the affixing of the stamp.

WHO IS LIABLE FOR THE PENALTY.

If A signs a note as promisor, gives it to B, the promisee, B indorses it and sells it to C, and C, D, E, and F indorse it, each in turn negotiating it and transferring it by indorsement to his indorsee, and the note is not "duly" stamped, which of these many parties is liable?

The Statute says, section 158, "any person or persons who shall make, sign, or issue," and each one of these persons has, in one sense, made, or signed, or issued this note. We are of opinion, however, that the words *make*, *sign*, or *issue* are not to

(*q*) See *ante*, Vol. I. p. 48.

be taken as distinct and in the alternative to this extent. We should think it more probable that the legal construction would rest on the word "issue," or on the completion of the note. And, therefore, he who *issues* the note is the one who would be liable, the subsequent signatures being regarded as made upon nothing, and as nullities. We should say that, for the purpose of this act, and in reference to this penalty, there can be but one issue of a note or bill; and he who issues an instrument not duly stamped incurs the penalty. If this be so, the question resolves itself into another. Who issues the note? The best answer we can make is, he who first delivers and negotiates the instrument, using it for his own benefit. Thus, if A sign a note not duly stamped, B, the payee, indorse to C, and C indorse to D, the signatures of A, B, and C, being wholly without consideration and for the accommodation of D, and D then negotiates and delivers the note for his own benefit, it is D who issues the note and incurs the penalty.

It is, however, possible that the broad language of section 158 might reach some cases of this kind.

HOW INDORSERS ARE AFFECTED BY ABSENCE OF THE STAMP.

The absence of a proper stamp makes the bill or note "invalid and of no effect." Indorsers therefore cannot be held upon it. And if no demand be made or notice given, or if demand be made and notice given as if the note were valid, and some irregularity occur in the demand or notice, which would discharge the indorsers, we apprehend that their rights or obligations are not affected thereby. The note was simply no note. And then the original obligation, which might have been extinguished or qualified by a valid note, would revive in full force. Hence every party, maker or indorser, and whether notified or not, would be liable upon any consideration which had passed to him as the cause of his becoming a party to the instrument.(*r*)

(*r*) In Cundy et al. *v.* Marriott, 1 B. & A. 696, the vendee of goods gave in payment an instrument purporting to be a bill of exchange; but it was written on a paper which had not affixed to it a sufficient stamp. It was not paid by the acceptor, but the vendor (the indorsee of the bill) did not give any notice of dishonor to the vendee,

OF RELIEF IN EQUITY.

We do not know why relief might not be given by equity courts of this country, in similar cases, and in the same way, in which it has been given in England.

For example. If a party agrees, for sufficient consideration, to give a good note, and gives one not duly stamped, a court of equity will compel him to give a valid note.(*s*)

So if a creditor holds two bills or notes, one valid, one invalid (because not duly stamped), and he receives money from his debtor on the bills, generally on account, he may apply it in satisfaction of the unstamped bill.(*t*)

And, at law, if a defendant pay money into court on the declaration on an improperly stamped bill, he cannot object to the sufficiency of the stamp upon the bill.(*u*)

Some of these decisions seem to give much force to instruments which the statute declares to be invalid and of no effect; but we think them within the scope of equity relief.

WHEN, IN CIVIL ACTIONS, AN OBJECTION TO AN INSTRUMENT FOR THE WANT OF A DUE STAMP SHOULD BE TAKEN.

By the want of a proper stamp, an instrument is rendered "invalid and of no effect." Not only is it incapable of giving

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who was the indorser. Held, that the instrument being of no value for want of a sufficient stamp, notice of dishonor was unnecessary. In Brown *v.* Watts, 1 Taunt. 352, it was held, that if a bill given in discharge of a debt is rendered inadmissible by being of an improper stamp, the plaintiff may prove his original debt. In Wilson *v.* Kennedy, 1 Esp. 245, where the plaintiff declared on a note which had been given for a debt, the plaintiff was permitted to go into evidence of the debt for which the note was given, the note not having the proper stamp, so that it could be given in evidence. In Swears *v.* Wells, 1 Esp. 317, where a creditor agreed to take part of his debt in hand, and a security for the remainder at a future day, but which security was by mistake given on a wrong stamp; it was held, that the creditor, if he has taken the money to be paid in hand, must notwithstanding wait till the time to be given by the security has expired. In Wilson *v.* Vysar, 4 Taunt. 288, it was held, that a bill of exchange written on a wrong stamp was no payment, although the parties would have paid it if presented in due time. In Alves *v.* Hodgson, 7 T. R. 241, it was held, that the plaintiff could not recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp; but he was permitted to recover on a general count.

(*s*) Aylett *v.* Bennett, 1 Anstruther, 415; 2 Bridgm. 538.

(*t*) Biggs *v.* Dwight, Mood. & R. 308.

(*u*) Israel *v.* Benjamin, 3 Camp. 40.

a right, or creating an obligation, or sustaining a defence, but it cannot be used as evidence in support of any action or any defence.

It is held in England, that the proper time for objecting to the admissibility or operation of an instrument, on the ground that it is not duly stamped, is before it is read. But if the defect or irregularity be one which requires evidence *ab extra* to show it, the instrument may be read when offered, subject to the objection, which the objector may afterwards prove as a part of his case.(*v*) We suppose the same ruling would be applied to similar cases here.

Evidence may perhaps be derivable in some cases from the stamp, as of the value or meaning intended by the instrument. But the cases do not exhibit many instances of this.(*w*)

OF UNSTAMPED BILLS OR NOTES AS EVIDENCE IN CRIMINAL CASES.

The earlier English stamp-acts contained no especial provisions on this subject. But unstamped instruments which should have been stamped were admitted as evidence in the trial of indictments for forgery(*x*); and, although not perhaps so certainly, in trials for larceny.(*y*) The 17 and 18 Vict. ch. 83, § 27, provides that such instruments should be admissible as evidence in any criminal proceeding. Our statute contains no such provision. We apprehend, however, that such would be the practice in the courts of this country; although not perhaps so freely or universally as if the statute expressly permitted it.

(*v*) Field *v.* Woods, 7 A. & E. 114.

(*w*) In Saunderson et al. *v.* Piper et al., 5 Bing. N. C. 425, a bill of exchange was expressed *in figures* to be drawn for £ 245, *in words* for two hundred pounds, value received, with a stamp applicable to the higher amount: held, that evidence to show that the words "*and forty-five*" had been omitted by mistake was not admissible, and the stamp appears to have been wholly disregarded.

(*x*) Rex *v.* Hawkeswood, 1 Leach, 257; Rex *v.* Teague, 2 East, P. C. 979.

(*y*) See 2 Leach, 706; Rex *v.* Yates, 1 Ry. & Mood. 170; Chitty on the Stamp Acts, 53 to 56.

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